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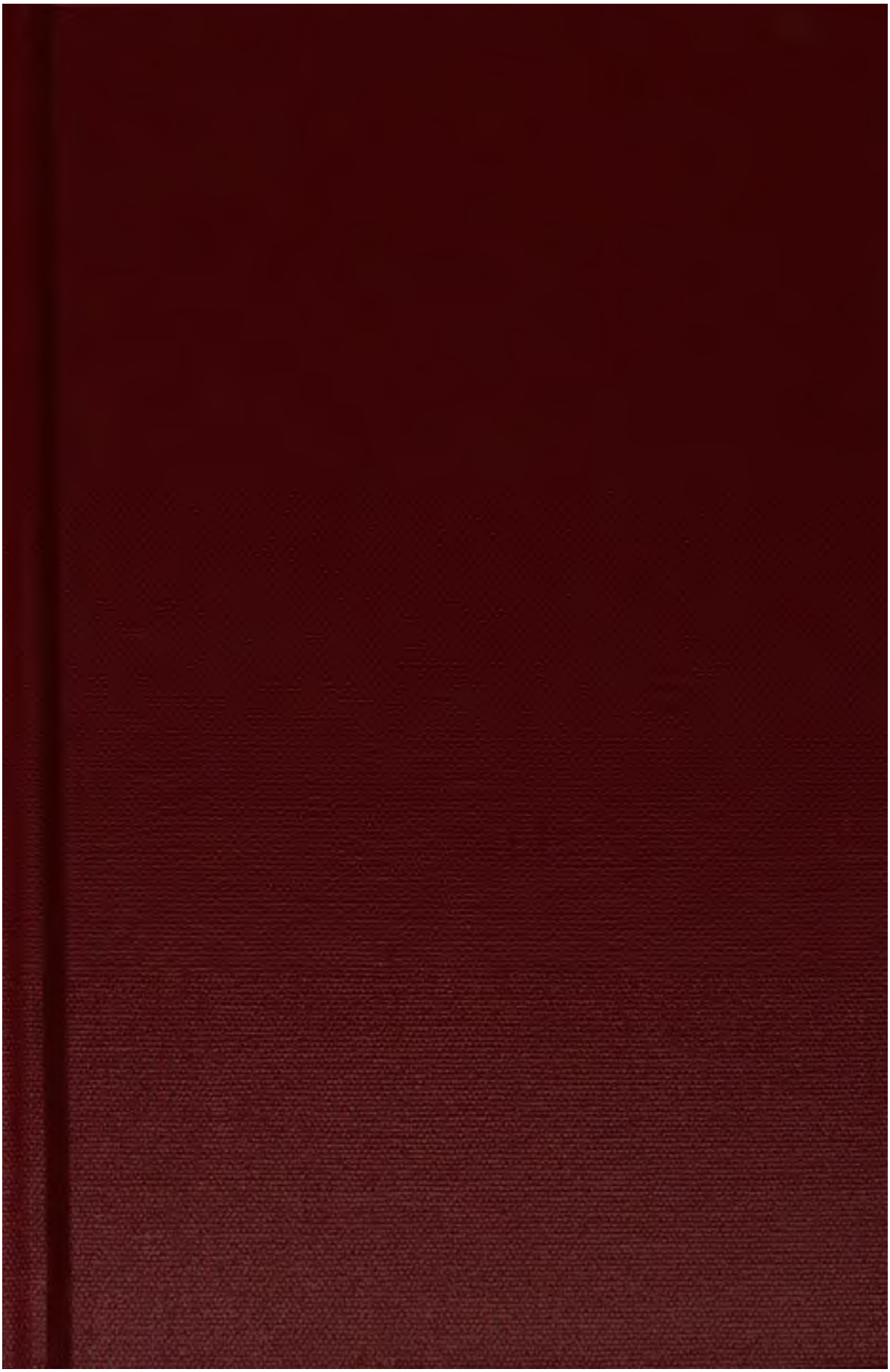

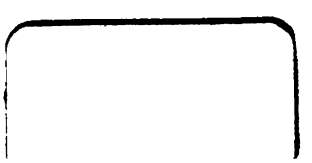

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HANDBOOK

OF THE

LAW OF EQUITY PLEADING

By BENJAMIN J. SHIPMAN
Author of "A Handbook of Common-Law Pleading"

ST. PAUL, MINN.
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1897

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To the Honorable

RENSSELAER R. NELSON,

For many years Judge of the United States District Court for the District of Minnesota, and often sitting in Equity Causes,—

In appreciation of his courtesy and consideration towards the younger members of the profession,

THIS BOOK IS INSCRIBED.

PREFACE.

The commendation bestowed upon the method followed in a former work (Common-Law Pleading) has led the writer to adopt a similar plan for the presentation of a statement of the rules and principles of Equity Pleading. The complicated nature of the subject, and the fact that, in many instances, changes and modifications in the equity method as received from England have rendered its practical application somewhat at variance with the theory upon which it was grounded and developed, will account to some extent for the difficulty which has been encountered in attempting to carry out this plan. While the principles applicable are, in most cases, as clearly defined and established as those of the older method, so much depends, in their application, upon the facts of the particular case that it is by no means easy to give an accurate statement of rules and propositions which shall universally and arbitrarily control the action of the court. In view of these conditions, the most that could be attempted was a statement, framed with as much precision as the circumstances would permit, of the rules and principles applicable in chancery procedure in this country, with a proper historical notice of their origin and development, and such an explanation of certain important branches of the system (like the plea, and the rules and limitations as to discovery) as was necessary to illustrate and explain the essential character of the system, or to lay the proper foundation for an understanding of the present method. In doing this, the relation between the two systems of pleading has been noticed wherever possible, as well as equivalent methods under code procedure, and the application, under the latter, of the equity rules to the substantial allegations in the statement in actions for equitable relief.

While the presentation of the subject has been condensed as much as possible, it may seem that the chapter on pleas and the matter in relation to discovery have been disproportionately expanded; but it was found that no brief explanation of either subject would suffice to present it intelligibly to either student or practitioner, and, while

both subjects are of less importance than formerly, the plea is still fully available, and discovery is still often sought.

The writer fully acknowledges his indebtedness to Judge Story's work, upon which his own has been largely modeled. Other works, including those of Daniell and Lubé, have been consulted and studied. The cases cited have been selected with a view to the proper illustration and explanation of the text, and include those which, whether American or English, will be found to be of most value as precedents.

B. J. S.

St. Paul, Minn., June 28, 1897.

TABLE OF CONTENTS.

CHAPTER I.

EQUITY PLEADING IN GENERAL.

Section		Page
1.	In General	1–2
2–3.	Nature and Object of the Pleadings in Equity	3–12

CHAPTER II.

PARTIES.

4–7.	General Rules	13–19
8.	Classification of Parties	19
9–10.	Necessary Parties	19–35
11–12.	Proper but not Indispensable Parties	36
13.	Formal Parties	36
14.	Parties with Separable Interests	36–44
15–16.	Parties Complainant—Capacity to Sue	44–48
17.	Real Party in Interest	48–49
18.	Joinder	49
19.	Persons United in Interest	49–51
20.	Persons Having a Common Interest	51–53
21.	Parties Respondent—Who may be Sued	54–55
22–24.	Joinder	55–60

CHAPTER III.

PROCEEDINGS IN AN EQUITABLE SUIT.

25.	In General	62–63
26.	Bill of Complaint	63–65
27–29.	Process for Appearance	65–74
30–34.	Appearance	74–78

Section		Page
35–40.	Proceedings on Default	78–85
41–42.	Defense	86
43–44.	Dilatory Defenses	86–88
45–46.	Peremptory, or Permanent, Defenses	89–90
47–48.	Formal Modes of Defense	90–91
49.	The Disclaimer	91–92
50–51.	The Demurrer	92–93
52–53.	The Plea	93–94
54–55.	The Answer	94–97
56–57.	The Replication	97–98
58.	Interlocutory Proceedings	99
59.	Amendment	99–104
60.	Receivers	104–107
61.	Payment of Money into Court	108–109
62.	Reference to a Master	109–112
63.	Feigned Issues	112–116
64–67.	Injunctions	117
68.	Preliminary Injunctions	117
69.	Perpetual Injunctions	117–125
70.	Production of Documents	125–127
71.	Intervention	127–128
72.	Ne Exeat	128–129
73–74.	The Evidence	129–133
75.	The Answer as Evidence	133–138
76–77.	Demurrer to Interrogatories	139–141
78.	The Hearing	141–145
79–82.	The Decree	145–149
83–84.	Correction or Reversal of Decrees	150–151
85.	Interlocutory Decrees—Motion or Rehearing	151–152
86.	Rehearing	152
87.	Bills of Review	153
88.	Bills to Impeach Decrees	154
89.	Appeals	154–158
90.	Enforcement of Decrees	158
91.	Contempts—Process for Contempt	159–160
92–93.	Sequestration	160–161
94.	Writ of Assistance	161–163
95–96.	Execution	163–164
97.	Bills to Enforce Decrees	164
98–100.	Motions and Petitions	164–166

CHAPTER IV.

BILLS IN EQUITY.

Section		Page
101–103.	Definition and Nature	168–171
104.	Classification of Bills	171
105–106.	Original Bills	171–173
107–108.	Original Bills Praying Relief	173
109.	Bills Involving a Determination of Rights Claimed in Opposition to Defendant	173–174
110.	Analysis of Bills	174–182
111.	Address or Direction	183
112–113.	Introduction	183–186
114–116.	Premises or Starting Point	186–192
117.	What must be Stated	193–202
118.	Privity	202–204
119–120.	Confederating Part	204–205
121–123.	Charging Part	205–211
124–125.	Averment of Jurisdiction	211
126–129.	Interrogating Part	212–219
130–139.	Prayer for Relief	220–233
140–143.	Prayer for Process	233–237
144–148.	Bills for Foreclosure of Mortgages	237–241
149–152.	Bills to Redeem	241–244
153–155.	Bills for Partition	244–248
156–159.	Bills to Quiet Title	248–254
160.	Bills of Peace	254–256
161–163.	Bills to Reform Instruments	256–259
164–167.	Bills for Specific Performance	259–264
168–170.	Bills to Set Aside Fraudulent Conveyances	264–269
171–172.	Bills for Infringement of Patents and Copyrights	269–273
173–175.	Creditors' Bills	273–277
176–180.	Bills of Interpleader	277–282
181–183.	Bills of Certiorari	282–283
184–185.	Original Bills not Praying Relief	283
186–188.	Bills to Perpetuate Testimony	283–285
189.	Bills to Examine Witnesses de Bene Esse	286–287
190–191.	Bills of Discovery	287–289
192.	Bills not Original—Definition and Classification	289
193–194.	Interlocutory Bills	290
195–198.	Supplemental Bills	290–296
199–204.	Bills of Revivor	297–301
205–206.	Bills of Revivor and Supplement	301–302

Section		Page
207–208.	Bills in the Nature of Original Bills	303
209–214.	Cross Bills	303–309
215–220.	Bills of Review	309–316
221–222.	Bills to Impeach Decrees for Fraud	316–317
223.	Bills to Suspend or Avoid the Operation of Decrees	317–318
224–225.	Bills to Effectuate or Carry out Decrees	318–319
226.	General Rules Governing the Bill—In General	319
227–229.	Sufficiency	319–322
230–231.	Certainty	322–332
232.	Consequences of Uncertainty	332–333
233–234.	Consistency and Directness	333–337
235–239.	Multifariousness	337–348
240.	Scandal	348–349
241.	Impertinence	349–351
242.	Consequences of Scandal or Impertinence	351–352

CHAPTER V.

THE DISCLAIMER.

243–245.	Definition, Nature, and Use	353–357

CHAPTER VI.

DEMURRER.

246–250.	Definition and Nature	358–363
251–253.	Form of Demurrer—General and Special Demurrers	363–372
254.	Demurrers Ore Tenus	372–373
255.	Speaking Demurrers	373–374
256.	Admissions Made by Demurrer	374–376
257–261.	Effect of Order Sustaining or Overruling Demurrer	376–381
262.	Conclusiveness of Final Order or Decree Entered on Demurrer	381–384
263.	Grounds of Demurrer	384
264.	Demurrers to Original Bills for Relief	384
265.	Demurrers to Both Relief and Discovery	384–386
266–267.	Demurrers to Relief Alone	386
268.	Objections to the Jurisdiction	387–390
269.	Objections to the Person of Complainant	390–391
270.	Objections to the Form or Frame of the Bill	392–395
271.	Objections to the Substance of the Bill	395–399

Section		Page
272.	Demurrers to Discovery Alone	400–401
273–274.	Objections to Particular Discovery	401–404
275.	Demurrers to Original Bills not for Relief	404
276.	Demurrers to Bills not Original	405–407

CHAPTER VII.

THE PLEA.

277–280.	Definition, Nature, and Office of Pleas	408–422
281–283.	Admission Made by a Plea	422–426
284–290.	Effect of Decision on Argument of Plea	426–432
291.	Form of Pleas	432
292.	Pure Pleas	433–435
293.	Negative Pleas	435–436
294.	Anomalous Pleas	436–438
295–299.	Answers in Support of Pleas	438–442
300.	Pure Pleas	443
301.	Negative Pleas	444–445
302.	Anomalous Pleas	445–446
303.	Pleas Overruled by Answer	447–448
304.	Answer in Subsidium	448–449
305.	Grounds of Pleas	449
306.	Pleas to Original Bills for Relief	449
307.	Pleas to Both Relief and Discovery	449–452
308–309.	Pleas to Relief Alone	452–453
310.	Pleas to the Jurisdiction	454–456
311.	Pleas to the Person	456
312.	Of Plaintiff	456–458
313.	Of Defendant	459
314.	Pleas to the Bill	460–464
315–317.	Pleas in Bar	464–465
318.	Bar Created by Statute	465–468
319–320.	Bar Created by Matter of Record	468–472
321.	Bar Created by Matter in Pais	472–477
322.	Pleas to Discovery Alone	478
323.	Objections to Particular Discovery	479
324–325.	Pleas to Original Bills not for Relief	479–480
326–328.	Pleas to Bills of Discovery	480–482
329.	Pleas to Bills not Original	483–485

CHAPTER VIII.

THE ANSWER.

Section		Page
330.	In General	486–490
331–335.	Nature and Office of the Answer	490–497
336–339.	Substance and Effect of the Answer	497–500
340.	Certainty	500–502
341–342.	Scandal and Impertinence	502–504
343–345.	Sufficiency of Answer	504–517
346–347.	Effect of Insufficiency in Answer	517–518
348–350.	Responsiveness	519–522

CHAPTER IX.

THE REPLICATION.

351–352.	In General	523–526

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HANDBOOK

OF THE

LAW OF EQUITY PLEADING.

CHAPTER I.

EQUITY PLEADING IN GENERAL.

1. In General.
2-3. Nature and Object of the Pleadings in Equity.

IN GENERAL.

1. Equity pleading, in general, is the system regulating the structure and use of the formal pleadings of the parties in suits in equity.

The system of equity pleading in use at the present day embodies the accumulated rules and precedents which have been framed and have arisen under the application of the principles and maxims of equity jurisprudence, with such modifications or enlargement of the older methods as have been created by statutes and rules of court. As above stated, it regulates the structure and use of the formal pleadings or statements of the parties to suits in equity, and though originally it was a loose and indefinite mode of proceeding, framed rather to suit the special requirements of cases calling for its use than according to any settled practice, it is now a distinct and complete system, governed by well-settled rules and principles, and fully supported by precedent. While not generally so formal and artificial as the common-law system, it is in many ways more complicated, and is often understood as call-

ing for more extended knowledge and greater acuteness and experience in the pleader, though its rules and principles, when examined, are found to be in the main both clear and appropriate to the accomplishment of the object contemplated. Its origin is found in the adoption of means by which the relief wanting at common law was obtained, and, after slow but steady development, it became really a separate and distinct system, with the establishment of courts of equity as independent jurisdictions. Like such courts, its foundation rested upon the necessity for some method of supplying or remedying the defects of the common law, where the latter either afforded no relief at all through its recognized modes of procedure, or where, if redress could be had, it was not such as was required by the circumstances of the particular case, according to equity and natural justice. The system thus established originally differed from the common law chiefly in following a different method of procedure,—thereby affording different remedies from those available in courts of law, new ones being constantly adopted to meet the requirements of particular cases,—but finally developed into a separate and distinct system, framed in accordance with, and limited only by, the rules and principles of the equitable jurisdiction with which it arose. In accordance with the theory of that jurisdiction, its aim, as we shall hereafter see, was and is to present the facts of the controversy in a proper manner for examination by the court, and thereby to obtain a decree decisive of the full merits of the controversy and adjusting the rights of all parties interested. In this the equity system differed, and still differs, from the pleadings at common law; the object of the latter being the production of a single issue, of law or fact, for the decision of the court or jury, respectively, to be followed by the judgment, and either by steps for the correction of errors resulting in prejudice to the unsuccessful party, or by execution.[1] In equity the issues need not be kept distinct, and the rules of pleading are consequently more flexible and liberal than at law; but it will be seen hereafter that they are equally regulated by principle, and that the entire system of equity pleading is as logical and symmetrical in its arrangement, and as strictly governed by precedent, as any other.

§ 1. [1] Shipman, Com. Law Pl. (2d Ed.) c. 3, § 30.

NATURE AND OBJECT OF THE PLEADINGS IN EQUITY.

2. Equity pleadings are the written statements of the parties to an equitable suit, on the record, of all facts which in law must constitute what will be the complaint or defense of the party in evidence.

3. Their object is to set forth the title or right of the complainant to relief, and the matters available to the defendant in opposition, in such manner as to present definite and concise issues for hearing and decision by the court, upon which a general decree may be rendered, covering the whole merits of the cause, and defining and adjusting the rights of all parties in interest.

The formal pleadings in equity consist of the written statements of the respective parties to the suit, upon the record,—that is, the written statement of the complainant, or plaintiff, containing, in due legal form, the facts of the case upon which he rests his right to relief or to some equitable interposition or aid from the court; and the written answer or defense of the defendant or respondent, to the charges of the complainant, either denying them altogether, or admitting them, and relying upon other matters as a bar to the suit, or, still admitting them, insisting upon a want of right or title in the complainant to the relief, aid, or interposition asked for; and, finally, the written reply of the complainant to the defense interposed. These, in their order as given, comprise all the regular pleadings now allowed, though the series formerly consisted of the bill, answer or plea, and replication, followed by the rejoinder to the replication, surrejoinder to the rejoinder, rebutter, and surrebutter, the same names being preserved, after the bill and answer, as at common law. The modern series always terminates with the replication. As the latter is now almost wholly formal, the important pleadings are the bill on the part of the complainant, and the answer of the defendant. Accompanying these, or, more often, appearing as substitutes for the answer, come the demurrer and plea, both available only to the defendant, and both

derived from the common law, and unknown to the original system of equity procedure, but still of importance.

Origin and Development of the Method.

The history of equity pleading is closely associated, in fact is almost identical, with that of equity jurisprudence. Without direct authority for the statement, it seems most probable that the equitable jurisdiction of the English court of chancery derived its source from the witenagemote or grand council of the Anglo-Saxons, at which causes between subject and subject, as well as national affairs, were decided. The growth of the business brought before this council caused the establishment of an inferior court or council called the "Aula Regis," for the purpose of attending to matters of less than national importance, and this, at first, was presided over by the king, and later, by reason of his increasing duties in affairs of government, by a grand justiciar, under whom, however, the powers of this tribunal became more restricted. The justiciar, in the exercise of his authority, being obliged to regulate his proceedings chiefly by the rules and precedents of the common law, it was often the case that one aggrieved by a judgment which, while legal, was still inequitable and oppressive, sought redress by an appeal to the king himself as holding the prerogative of finally administering justice. This was done by a petition or bill, setting forth the facts upon which his appeal was based, and praying relief according to those facts. There were also other cases in which application was made to the king, in the same manner, by reason of the absence of any remedy, or of an appropriate or sufficient remedy, at common law.

The common law of England was founded upon certain fixed principles, and it was only by set forms of procedure that rights could be enforced, or civil injuries redressed. In consequence, while those principles were held to be founded on reason and equity, and while, so long as the common law was in process of formation, and therefore still a lex non scripta, it was capable, not only of being extended to cases not expressly provided for, though within its spirit, but also of having the principles of equity applied in decisions under it according to the necessities of a particular case, many cases were continually arising which the existing system was inadequate to meet, either from a total want of

principles governing the case, or by reason of the absence of any remedy, or of an adequate remedy, by which the desired relief could be obtained. The remedies available were thus so defective that an appeal or petition to the sovereign became a necessity. At first heard by the king and his council, these applications became at length so frequent that it was found necessary to refer a part of them to the chancellor, who was also the king's secretary and the registrar of the decrees of the Aula Regis.[1] It thus became the custom of the king to refer all these petitions which prayed extraordinary remedies to the chancellor and master of the rolls, or to either alone, by writ under the privy seal, directing them to give such remedy as should appear to be "consonant to honesty." With the growth and advancement of the nation, the rigor of the common law was more sensibly felt, and these references to the chancellor increased until, from exercising only an occasional jurisdiction, he acquired an established and permanent authority.

In the reign of Edward III. the English court of chancery appears to have been first clearly established as a regular court for administering extraordinary relief, mainly, it is considered, by a writ or ordinance which referred all such cases to be dispatched by the chancellor or keeper of the privy seal, and which conferred a general authority to grant relief in all matters whatsoever requiring the exercise of the "prerogative of grace." Here is to be noted one of the great and fundamental distinctions between the jurisdictions of chancery and the common law, the former being exercised under the general authority mentioned, while the latter depended, in each case, upon the authority delegated by a particular writ which could only be issued in cases provided for by positive law; and it is also to be noted that, as a necessary and logical consequence of the broad discretion thus allowed, the powers of chancery, and of the resulting system now known as "equity," have attained such a wide range.[2] From the time of its establishment

§§ 2–3. [1] At the time when the exercise of a chancery jurisdiction in civil cases began to be distinctly noticeable, during the reign of Edward I., the office of chancellor was in existence, though not as known at a later time; his functions being principally exercised as a high dignitary of the church, with an independent legal jurisdiction. The court of chancery, as then recognized, was not mentioned as a court of equity. See 1 Spence, Eq. Jur. p. 334, note b.

[2] 1 Spence, Eq. Jur. pp. 337, 338.

the court of chancery became more and more firmly settled, and its jurisdiction more extended, until it became a tribunal of great importance, with as fixed and complete rules of procedure as the common-law courts. It is from this procedure as finally established, or, to be more accurate, it is from the rules and practice of the high court of chancery of England, in the exercise of its extraordinary jurisdiction, as it existed at the time of the adoption of our federal and state constitutions, that the present equity system of this county is derived;[3] and those rules and principles are still in force with us, save where modified, extended, or abrogated by constitutions, statutes, or rules of court provided for by statute.[4]

With the establishment and growth of chancery jurisdiction came the formation and development of the system of pleading, by which the facts claimed to warrant the aid or interposition asked for were presented for examination and adjudication. The court of chancery, in the construction of this system, rejected the strict rules of the common law, and established a method of its own, as the substantial ends of justice could not otherwise have been attained.[5] Before its recognition as a separate court, in the various means adopted to obtain relief without or beyond the remedial scope of the common law, the proceeding had been by petition where the aid of the king or his council was sought, and by bill where that of the chancellor was invoked; but the term "bill" was finally adopted in all cases, and, from the time of the establishment of this court to the present day, the commencement of the suit has been always by bill. Prior to the ordinance of 22 Edw. III., above mentioned,[6] as there was no general delegation of authority or jurisdiction, it seems that a preliminary writ was often necessary; but after that time, the general authority being taken as either expressly conferred or implied, no writs were necessary, as at common law, to confer jurisdiction, the party applying as he would previously have done to the council or parliament, by

[3] See Equity Rule 90, and Mr. Justice Bradley's note to Thomson v. Wooster, 114 U. S. 104, 112, 5 Sup. Ct. 788.

[4] See Boyle v. Zacharie, 6 Pet. 648.

[5] 1 Spence, Eq. Jur. pp. 338, 339.

[6] Ante, p. 5.

petition only, or by bill only to the chancellor. The answer of the respondent followed the bill, and the replication the answer, and so on, as we have already seen.

In the earliest times, the pleadings seem to have been oral, as originally at common law, but later they were in writing, and have since always been written, the procedure in equity dispensing with the mode of trial followed at common law, except in special cases.[7]

In the formation of its system of pleading, chancery followed both the civil or canon law and the common law,—the former, in the practice of obtaining a discovery by an answer under oath, and to some extent in the method of stating facts; and the latter, in the formal method of conducting the suit. The demurrer and plea, also unknown to the early chancery practice as well as to the ecclesiastical courts, were both borrowed from the common law, and are used upon the same theory as under the latter system.[8] Aside from the change from the early practice of allowing pleadings after the replication, by cutting off the useless rejoinder, etc., the pleadings in chancery have remained for many years practically the same as at the present time, the regular pleadings consisting of bill, answer, and replication, with the demurrer or plea replacing or accompanying the answer in proper cases.

The procedure of the high court of chancery of England, as it existed at the time of the adoption of the constitution of the United States, was taken as the method in this country for both state and federal courts, so far as applicable under state and federal constitutions and laws, and is followed at the present time wherever statutes or rules of court do not prescribe a different method.[9] The courts of the United States having an equitable jurisdiction, follow the English practice, except where their own rules or those of the supreme court of the United States have fixed the method of procedure,[10] and the several states, or such of them as have retained a separate chancery jurisdiction, have also adopted the same rules

[7] See post, c. 3, pp. 90, 91.

[8] See post, c. 6, p. 359; Id. c. 7, p. 412.

[9] The powers and jurisdiction of the New York court of chancery were modeled upon those of the court of chancery in England; and so in the case of New Jersey, Delaware, South Carolina, and Mississippi.

[10] See Boyle v. Zacharie, 6 Pet. 648.

and principles, subject to a like limitation by their own laws or rules of court.[11] The United States circuit courts, which exercise the most important equity powers, have a chancery jurisdiction in every state, and the same chancery powers and rules of decision in all;[12] and while those states which have separate equity tribunals may proceed according to their adaptation of the English method, and may create, through their legislatures, new rights to which the proper federal court will give effect, they cannot extend or limit the jurisdiction or procedure of the latter, nor maintain an equitable system contrary to, or inconsistent with, that established under the federal constitution.[13] The procedure thus established included, of course, the method of pleading in equitable suits, and the rules and principles applied in England prior to the change to the procedure now followed there were adopted here, so far as applicable. The forms in use were also generally adopted, with proper alterations to suit different conditions, and, except as fixed or modified by statutes or rules of court, are practically the same, though much has been done towards simplifying and abbreviating them. As between state and federal courts, though there may be differences in the technical form, the general frame and substance of pleadings in strictly equitable suits will be found the same.

Jurisdiction Limiting Use—The Rule.

Although the subject of equity jurisdiction is not within the scope of this work, it seems proper to notice here the general principles upon which it rests, and by which its limits are defined, since it is a fundamental rule in all equity pleading that no bill can be sustained which does not have as its foundation one or more of the grounds of such jurisdiction.[14] This jurisdiction results from, and was established by reason of, the inability of courts of justice to afford adequate relief in particular cases, on account of the great variety of complex relations between men, entailing duties and obligations, the performance of which could not be enforced at com-

[11] As to the chancery system in New Jersey, see Southern Nat. Bank v. Darling, 49 N. J. Eq. 398, 23 Atl. 475.

[12] U. S. v. Howland, 4 Wheat. 108.

[13] See Suydam v. Broadnax, 14 Pet. 67; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940; Boyle v. Zacharie, 6 Pet. 648.

[14] Story, Eq. Pl. § 9.

mon law. The deficiency in the common-law mode of trial, as already stated, arises either from the fact that it provides no remedy, or that, if one exists, it is rendered inapplicable or ineffectual, either from the method of proof used, the mode of trial, or the measure of relief afforded.[15] In such cases equity interposes in favor of the litigant, according to the circumstances of the case, and corrects the deficiency by obliging a respondent or defendant to answer and make a discovery under oath, or by causing the testimony to be taken in writing, for which the common-law mode of trial, in the absence of any statute, makes no provision; or by giving a specific remedy adapted to the particular case. As the system of equity procedure adopted in this country from that of the high court of chancery of England applies only to the remedy, and not to the right,[16] the powers of courts of equity in this country can extend only to the enforcement of such rights as are given by our state or federal constitutions or laws. The judiciary act of congress of 1789 provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law";[17] and this is the important test of equity jurisdiction at the present time, in all courts of equity of this country, both state and federal,[18] and necessarily determines when equity procedure or pleading may be used. In applying this test, however, a liberal construction of the words used is adopted. "By 'inadequacy' of the remedy at law is * * * meant, not that it fails to produce the money,—that is a very usual result in the use of all remedies,—but that in its nature or character it is not fitted or

[15] Ante, p. 4.

[16] Meade v. Beale, Taney, 339, 361, Fed. Cas. No. 9,371.

[17] Rev. St. U. S. § 723. As to the construction of this provision, see Insurance Co. v. Bailey, 13 Wall. 616; Lewis v. Cocks, 23 Wall. 466; Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276. And see Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, per Gray, J.

[18] "Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." Fetter, Eq. p. 10.

adapted to the end in view;" [19] and in the federal courts, at least, the "adequate remedy" at law is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by congress.[20]

Analogy between Equity and Common-Law Pleadings.

Although pleading in equity is a separate and distinct system from that at common law, there is a plain analogy between the two that is worthy of the attention of the student, who, it is to be assumed, is already conversant with the latter, as many of the common-law rules and principles, such as those relating to certainty, materiality, and a logical and concise method of statement, have either been retained or are closely followed in equity. It is for this reason that a previous knowledge of common-law rules and principles is really necessary to a thorough understanding of the equity system. To notice this analogy briefly: The declaration and bill are clearly analogous, in that they must both state the right or title of the party suing, and also an injury to that right, though the first states the cause of complaint as a ground for obtaining judgment,—process to compel an appearance having already been issued,—while the bill sets forth the charge as a ground for the issuance of the subpœna. The bill thus admits of the same modes of defense as at common law, though in different form, the answer, so far as it simply denies the allegations of the bill, being a plea in bar analogous to the general issue at common law. Again, if the respondent in equity does not wish to answer at all, he may offer a defense by demurrer, which raises a question of law upon the complainant's own showing; or if, without answering to the merits, he wishes to bar the further progress of the particular suit, he may present a defense by plea, sometimes accompanied by an answer, showing facts sufficient for that purpose, like the common-law plea in abatement. So, also, the answer proper (as distinguished from the discovery), which is the important pleading of the respondent in placing the merits of the cause in issue, either traverses or denies the allegations of the bill or admits them to

[19] Per Miller, J., in Thompson v. Allen County, 115 U. S. 550, 554, 6 Sup. Ct. 140.

[20] McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940.

be true, or, still admitting them, alleges other inconsistent facts which, if established, may destroy the effect of the complainant's charge. The answer is thus analogous to the general issue at common law, as we have already seen, and also to the plea in confession and avoidance, though the analogy ceases as to so much of it as contains statements in reply to interrogatories contained in the bill, and giving the discovery thereby sought.[21]

Equity Pleading under the Codes.

As a matter of comparison, which it may be well for the student to note, it seems that, even where the system of code pleading has been substituted for both the common-law and equity methods, equitable rights are still to be determined according to the doctrines of equity jurisprudence, and the facts to support or oppose the granting of equitable relief must therefore still be stated in such a manner as to show the title, right, or interest of the party pleading them, unless a particular method is provided by the statute, though it is difficult to state any rule of general application. A provision common to all the codes does away with the distinction between actions at law and suits in equity, so far as the form of the proceedings is concerned; both declaration and bill being replaced by the single form of the petition or complaint, and the other pleadings being also expressly designated.[22] While former distinctions have thus been abolished, and the proceedings in the two classes of actions reduced to a common and uniform system, it can hardly be said that new principles of pleading have been formulated, or that well-known rules of construction, in the absence of express statutory provisions, have been set aside. The essential difference between legal and equitable actions must still be recognized, it would seem, to the extent that equitable rights must still be determined according to the doctrines of equity, and also in the peculiar modes of proceeding which are sometimes required in such cases, and legal rights are to be ascertained and adjudged upon principles of law; and that, consequently, where a petition or complaint is framed for obtaining equitable relief, the

[21] The student will find a full and accurate statement of the analogy between the two systems in Lube, Eq. Pl. §§ 203, 215.

[22] See Bliss, Code Pl. (3d Ed.) §§ 4–7, 143, 323, 393.

statement of facts prescribed by the codes must be at least what was required under the older method,—that is, it must show the party's right to the equitable relief sought, and that, if the statute is silent, the sufficiency of the statement presented must be determined by the rules applied in courts of equity.[23] The object, not the form of the proceedings, must determine whether the suit is legal or equitable, and the test already mentioned, viz. the want of an adequate remedy at law, is still recognized to the extent that such a want must generally exist before equitable relief will be granted. A petition or complaint framed only for the enforcement of a strict legal right, or to obtain legal redress for its violation, would not, as a rule, admit of an adjustment of the controversy requiring the exercise of the equity powers of the court, and the granting of relief not shown, upon the face of the pleading to be due the litigant.

The foregoing explanation of the general nature, origin, and development of the system of pleading, which we shall hereafter examine in detail, has been made with a view to, at least, prepare the student for an intelligent understanding of what is to follow, though it is necessarily brief, and perhaps wanting in detail as to matters which he may desire to investigate. It is to be assumed, and should be the fact, that he is already familiar with the rules and principles of common-law pleading, as well as with the principles and maxims of equity jurisprudence, as a knowledge of the first is necessary to enable him to understand and appreciate the force and effect of the rules and principles of pleading in equity, and some understanding of the latter, at least, is a condition precedent to a proper appreciation of the circumstances under which the powers of courts of equity are exercised.

[23] See the rules as to the manner of stating facts, Bliss, Code Pl. (3d Ed.) c. 15, all of which, unless based upon the statute, will be noticed hereafter, in connection with the statement of facts in bills in equity.

CHAPTER II.

PARTIES.

4–7. General Rules.
8. Classification of Parties.
9–10. Necessary Parties.
11–12. Proper but not Indispensable Parties.
13. Formal Parties.
14. Parties with Separable Interests.
15–16. Parties Complainant—Capacity to Sue.
17. Real Party in Interest.
18. Joinder.
19. Persons United in Interest.
20. Persons Having a Common Interest.
21. Parties Respondent—Who may be Sued.
22–24. Joinder

GENERAL RULES.

4. All persons should be made parties to a suit in equity who are directly interested in obtaining or resisting the relief prayed for in the bill, or granted by the decree.

5. No persons not so interested should be joined, either as complainants or defendants, except

EXCEPTION—Strangers in interest may sometimes be made parties for the sake of discovery.

6. Persons claiming property under inconsistent titles should not be joined as complainants or defendants.

7. These general rules are subject to modification, in the sound discretion of the court, according to the circumstances of each case.

"In determining who are proper parties to a suit, courts of equity are guided by two leading principles: One of them is a principle admitted in all courts of justice in this country, upon

questions affecting liberty or life or property, namely, that no proceedings shall take place with respect to the rights of any one except in his presence. Thus, a decree of a court of equity binds no one who is not to be regarded, according to the rules of the court, either as a party, or else as one who claims under a party, to the suit. The second is a principle which in this country is peculiar to courts of equity, namely, that when a decision is made it shall provide for all the rights which different persons have in the matters decided.[1] For a court of equity in all cases delights to do complete justice, and not by halves;[2] to put an end to litigation; and to give decrees of such a nature that the performance of them may be perfectly safe to all who obey them. 'Interest reipublicæ ut sit finis litium.'[3] In this respect there is a manifest distinction between the practice of a court of law and that of a court of equity. A court of law decides some one individual question which is brought before it. A court of equity not merely makes a decision to that extent, but also arranges all the rights which the decision immediately affects."[4] It thus often happens that even where persons cannot be joined, as where they are beyond the jurisdiction of the court, and therefore not amenable to its process, the suit will be stayed or dismissed, unless such persons will be merely passive objects of the decree to be rendered, for their rights are only incidental to those of the parties already before the court.[5] Mr. Story states the rule as follows: "All per-

§§ 4–7. [1] Story, Eq. Pl. (10th Ed.) § 72. See, also, Mitf. Eq. Pl. (Jeremy, Ed.) §§ 163, 164; Holland v. Prior, 1 Mylne & K. 237, 240; Caldwell v. Taggart, 4 Pet. 190; West v. Randall, 2 Mason, 181, 190, Fed. Cas. No. 17,424; Joy v. Wirtz, 1 Wash. C. C. 517, Fed. Cas. No. 7,554.

[2] Knight v. Knight, 3 P. Wms. 331, 333. See, also, Madox v. Jackson, 3 Atk. 405, 406; Galton v. Hancock, 2 Atk. 430, 436.

[3] Betton v. Williams, 4 Fla. 11, 17; Bland v. Fleeman, 29 Fed. 669; Jessup v. Railroad Co., 36 Fed. 735; Barney v. Baltimore City, 6 Wall. 280; Williams v. Bankhead, 19 Wall. 563, 571; Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422; Howell v. Foster, 122 Ill. 276, 13 N. E. 527; Watson v. Brewing Co., 61 Mich. 595, 28 N. W. 726; Swift v. Lumber Co., 71 Wis. 476, 37 N. W. 441.

[4] Calv. Parties (2d Ed.) pp. 2, 3.

[5] Story, Eq. Pl. (10th Ed.) § 81; Mitf. Eq. Pl. (Jeremy, Ed.) 31, 32; Meux v. Maltby, 2 Swanst. 277; Malcolm v. Scott, 3 Hare, 39; Gray v. Larrimore, 2 Abb. (U. S.) 542, Fed. Cas. No. 5,721.

sons materially interested in the subject-matter ought to be made parties to the suit, either as plaintiffs or defendants, however numerous they may be, in order, not only that complete justice may be done, but that multiplicity of suits may be prevented; or, as the rule was once stated by Lord Hardwicke,[6] that all persons ought to be made parties before the court who are necessary to make the determination complete and to quiet the question." [7] And further: "It has also been suggested that it would be a more just exposition of the general rule to declare that all persons interested in the object of the suit ought to be made parties." [8] The author, however, goes on to show that the decisions have not all conformed to these statements of the rule; that it is not founded upon any positive and uniform principle, and does not admit of being expounded by any universal theory as a test.[9]

Nature of the Interest Required.

What the nature and extent of the interest must be to render a person a proper or necessary party is not easy to state.[10] No one need be made a party complainant in whom no interest exists,

[6] Poore v. Clark, 2 Atk. 515.

[7] Story, Eq. Pl. (10th Ed.) § 76a. Generally all persons interested in the subject of the suit should be made parties, plaintiffs or defendants. Stevenson v. Austin, 3 Metc. (Mass.) 474, 480; Parker v. Lincoln, 12 Mass. 16, 18. The rule requiring all parties materially interested to be made parties does not apply in its full force to bills of discovery, but only to bills of relief. Trescot v. Smyth, 1 McCord Eq. (S. C.) 301, 303. A person interested in a cause in which he is not made a party may, upon application to the court, be permitted to intervene and have his rights passed on at the hearing. Marsh v. Green, 79 Ill. 385.

[8] Story, Eq. Pl. (10th Ed.) § 76b.

[9] "The truth is that the general rule in relation to parties does not seem to be founded on any positive and uniform principle, and therefore it does not admit of being expounded by the application of any universal theorem as a test. It is a rule founded partly in artificial reasoning, partly in considerations of convenience, partly in the solicitude of courts of equity to suppress multifarious litigation, and partly in the dictates of natural justice, that the rights of persons ought not to be affected in any suit, without giving them an opportunity to defend them." Story, Eq. Pl. § 76c.

[10] "With respect to the nature of the interest which requires a person to be joined in a suit, there is, of course, no difficulty as to persons against whom relief is expressly asked. But with respect to those who are incl-

and no one a party defendant from whom nothing is demanded.[11] No one who, without an interest in the suit, may still be examined as a witness, need be joined.[12] It seems that the interest requisite may be either present and immediate, or future and remote, but must be more than a merely consequential[13] or contingent one, as one depending upon the event of the suit,[14] and more than mere desires in relation to the subject in controversy.[15] One who has

dentally connected with the relief as against others, the line of demarkation is less easy to draw. The interests, however, which require such joinder, seem generally referable to one of the three following heads: First, interests in the subject-matter which the decree may affect, and for the protection of which the owners are joined; secondly, concurrent claims with the plaintiff, which, if not bound by the decree, may be afterwards litigated; and, thirdly, liability to exonerate the defendant or to contribute with him to the plaintiff's claim." Adams, Eq. (8th Ed.) p. 314. Inhabitants of a town, who own property liable to taxation therein, have sufficient interest in the share of the surplus revenue given the town under St. 1837, c. 85, to maintain a bill to prevent a misapplication of it by the town; if any interest is necessary, which, semble, is not. Simmons v. Inhabitants of Hanover, 23 Pick. (Mass.) 188 (1839). See Pope v. Inhabitants of Halifax, 12 Cush. (Mass.) 410. Where a bill seeks the advice or direction of the court as to the administration of a public charity, and especially where there is waste or mismanagement, actual or apprehended, or where the decree will affect the interest of the public as cestui que trust, the public law officer whose duty it is to have a care in such matters is a proper, and may be a necessary, party complainant or defendant. Newberry v. Blatchford, 106 Ill. 584. A person having no interest, legal or equitable, in land, beyond a mere possession, cannot maintain a bill in respect thereto. Smith v. Hollenback, 46 Ill. 252. Followed by Smith v. Brittenham, 109 Ill. 540. Cf. Hoare v. Harris, 11 Ill. 24; Bowles v. McAllen, 16 Ill. 30.

[11] Kerr v. Watts, 6 Wheat. 550; Story, Eq. Pl. (10th Ed.) § 234. See, also, Wych v. Meal, 3 P. Wms. 310, 311, note; Griffin v. Archer, 2 Anstr. 478; Plummer v. May, 1 Ves. Sr. 426; Mare v. Malachy, 1 Mylne & C. 559; West v. Randall, 2 Mason, 181, 192, 197, Fed. Cas. No. 17,424; Trecothick v. Austin, 4 Mason, 16, 42, Fed. Cas. No. 14,164; Petch v. Dalton, 8 Price, 912. A mere agent in the transaction is not a necessary party. Ling v. Colman, 10 Beav. 370; Miller v. Whittaker, 23 Ill. 453; Lyon v. Tevis, 8 Iowa, 79. Cf. Egmont v. Smith, 6 Ch. Div. 469.

[12] Reeves v. Adams, 2 Dev. Eq. (N. C.) 192.

[13] Story, Eq. Pl. §§ 140, 226.

[14] Barbour v. Whitlock, 4 T. B. Mon. (Ky.) 180.

[15] See Crocker v. Higgins, 7 Conn. 342; How v. Best, 5 Madd. 19.

aided in maintaining the suit does not become a party from that fact alone;[16] and, although an interest may possibly exist, no one need be made a party to a suit in chancery, against whom, if the suit is brought to a hearing, the complainant can have no decree, or against whom he seeks no relief.[17]

Strangers in Interest Joined for Discovery.

It has been held in some cases that persons against whom no decree is sought or can be rendered may nevertheless be joined in order to obtain a discovery. Thus, it has been held that the officers and members of a corporation may be joined in a bill against the corporation, in order to obtain a discovery as to matters learned by them in the transaction of the corporate business.[18] It follows that where no discovery is sought, as where an answer

[16] Allin's Heirs v. Hall's Heirs, 1 A. K. Marsh. (Ky.) 525.

[17] Todd v. Sterrett's Legatees, 6 J. J. Marsh. (Ky.) 425; Van Keuren v. McLaughlin, 21 N. J. Eq. 163; and see cases cited supra, note 11.

[18] Many v. Iron Co., 9 Paige (N. Y.) 189; Glyn v. Soares, 1 Younge & C. 644; Fenton v. Hughes, 7 Ves. 289; Wych v. Meal, 3 P. Wms. 310; Moodalay v. Morton, 1 Brown, Ch. 469; Gibbons v. Bridge Co., 5 Price, 491, 493; Brumly v. Society, 1 Johns. Ch. (N. Y.) 366; In re Alexandra Palace Co., 16 Ch. Div. 58; Post v. Railroad Co., 144 Mass. 341, 11 N. E. 540; Virginia & A. Min. & Manuf'g Co. v. Hale & Co., 93 Ala. 542, 9 South. 256; Buckner v. Abrahams, 3 Tenn. Ch. 346; Colonial & U. S. Mortg. Co. v. Hutchinson Mortg. Co., 44 Fed. 219; Colgate v. Compagnie Francaise du Telegraphe de Paris, 23 Fed. 82; French v. Bank, 7 Ben. 488, Fed. Cas. No. 5,099; McGregor v. East India Co., 2 Sim. 452; Bolton v. Corporation of Liverpool, 3 Sim. 467. But see Wilson v. Church, 9 Ch. Div. 552, where it was held that an officer of a corporation could no longer be made a party merely for the purpose of obtaining a discovery. And see McComb v. Railroad Co., 7 Fed. 426, for a further limitation of this doctrine. The answers of the officers of a corporation cannot be read against the corporation. 1 Daniell, Ch. Prac. 133. "The principle upon which the rule has been adopted is very singular. It originated with Lord Talbot (Wych v. Meal, 3 P. Wms. 310), who reasoned thus upon it: That you cannot have a satisfactory answer from a corporation; therefore you make the secretary a party, and get from him the discovery you cannot be sure of having from them; and it is added that the answer of the secretary may enable you to get better information. The first of those principles is extremely questionable, if it were now to be considered for the first time; and, as to the latter, it is very singular to make a person a defendant in order to enable yourself to deal better, and with more success, with those whom you have a right to put upon the record;

under oath is waived, the officers of a corporation should not be joined in a suit against the corporation unless relief is also sought against them.[19]

Persons Claiming under Inconsistent Titles.

Persons who claim the property in controversy under inconsistent titles should not be joined, for it is obvious that persons claiming under one title have no interest in a controversy between persons claiming under an inconsistent title.[20] Thus, on a bill to foreclose a mortgage, a person claiming adversely to both the mortgagor and the mortgagee cannot be joined.[21]

The Rules not Arbitrary Ones.

From the very nature of equity procedure, the rules in question can only be rules of convenience, to be applied or modified accord-

but this practice has so universally obtained without objection that it must be considered established." Per Lord Eldon in Fenton v. Hughes, 7 Ves. 287, 289.

[19] Colonial & U. S. Mortg. Co. v. Hutchinson Mortg. Co., 44 Fed. 219; Boston Woolen-Hose Co. v. Star Rubber Co., 40 Fed. 167.

[20] Calv. Parties (2d. Ed.) 105; Story, Eq. Pl. (10th Ed.) § 230; Dial v. Reynolds, 96 U. S. 340; Saumarez v. Saumarez, 4 Myine & C. 331, 336; Marquis Cholmondeley v. Lord Clinton, 2 Jac. & W. 1, 135. "No person need be made a party to a bill who claims under a title paramount to that brought forward and to be enforced in the suit; or who claims under a prior title or incumbrance, not affected by the interests or relief sought by the bill." Story, Eq. Pl. (10th Ed.) § 230; Frye v. Bank, 11 Ill. 367. Cf. Allen v. Woodruff, 96 Ill. 11. See, also, Devonsher v. Newenham, 2 Schoales & L. 199, 207; Eagle Fire Ins. Co. v. Lent, 6 Paige (N. Y.) 635; Bond v. Connelly, 8 Ga. 302; Lange v. Jones, 5 Leigh (Va.) 192. A prior mortgagee is not a necessary party to a bill to foreclose a junior mortgage. Jerome v. McCarter, 94 U. S. 734; Hagan v. Walker, 14 How. 29; Carey v. Railroad Co., 161 U. S. 115, 16 Sup. Ct. 537. Where a receiver of mortgaged property is sought, a prior incumbrancer is a necessary party, for his rights are affected. Miltenberger v. Railroad Co., 106 U. S. 286, 1 Sup. Ct. 140. One who claims adversely to the mortgagor and mortgagee, and prior to the mortgage, cannot, for the purpose of trying the validity of such title, be made a party defendant to an action to foreclose the mortgage. Dumond v. Church, 4 App. Div. 194, 38 N. Y. Supp. 557. To a bill to enforce a trust it is not necessary to join as defendants parties having a prior interest, subject to which the assignment was made. Suydam v. Dequindre, Har. (Mich.) 347.

[21] Dial v. Reynolds, 96 U. S. 340.

ing to the circumstances of each case.[22] As a court of equity must necessarily adapt its decrees to the particular requirements of special cases, and as controversies often arise where, from their nature, one only nominally interested may be an indispensable party, or one really interested cannot be joined at all, a relaxation of the rule is necessary, as otherwise persons entitled to the aid or interposition of the court would be deprived of all remedy.[23] By an exercise of discretion in this respect, substantial justice to litigants can be rendered, and a multiplicity of suits avoided.[24]

CLASSIFICATION OF PARTIES.

8. Parties to suits in equity may be divided into two classes:

(a) Necessary parties.

(b) Proper but not indispensable parties.

SAME—NECESSARY PARTIES.

9. Necessary parties are those without whom the court will not proceed to a decree.

10. All persons who have such an interest in the controversy that a satisfactory decree cannot be enforced without directly affecting their rights are necessary parties, except

EXCEPTIONS—The following persons are not necessary parties unless their presence is required for the

[22] Story, Eq. Pl. (10th Ed.) § 76c; Fost. Fed. Prac. (2d. Ed.) § 59; Penny v. Watts, 2 Phil. Ch. 149; Plunket v. Penson, 2 Atk. 51.

[23] Payne v. Hook, 7 Wall. 425. And see Wiser v. Blachly, 1 Johns. Ch. (N. Y.) 437; Vann v. Hargett, 2 Dev. & B. Eq. (N. C.) 31; Townsend v. Auger, 3 Conn. 354; Scofield v. City of Lansing, 17 Mich. 437; Hallett v. Hallett, 2 Paige (N. Y.) 15; Carey v. Hoxey, 11 Ga. 645; Elmendorf v. Taylor, 10 Wheat. 152; Barney v. Latham, 103 U. S. 205.

[24] Mitf. & T. Eq. Pl. pp. 18, 19, 22; Story, Eq. Pl. (10th Ed.) § 72; Knight v. Knight, 3 P. Wms. 331, 333; West v. Randall, 2 Mason, 181, Fed. Cas. No. 17,424. The exercise of this discretion may be reviewed on appeal. Caldwell v. Taggart, 4 Pet. 190; Robertson v. Carson, 19 Wall. 94; Railroad Co. v. Orr, 18 Wall. 471.

protection of others who have been made defendants:

(a) Persons whose interest is very small.

(b) Persons whose interest has been created to deprive the court of jurisdiction.

(c) Persons who consent to the decree sought.

(d) Persons against whom the complainants waive their rights.

(e) Persons who are legally represented.

Necessary or indispensable parties,—as they are sometimes called,—as the name indicates, are those without whom the court will not proceed to a decree. All persons are necessary parties who have an interest in the controversy of such a nature that a final decree cannot be made without either directly affecting that interest, or leaving the controversy in such a condition that its final determination according to equitable principles may be wholly impossible.[1] The necessity for the joinder of such persons may arise either from the nature and extent of their interest in the controversy, or because their presence as parties is necessary to a proper determination and adjustment of the rights of those already before the court.[2] The principle upon which the rule as to in-

§§ 8–10. [1] Sears v. Hardy, 120 Mass. 524 (1876); Cassidy v. Shimmin, 122 Mass. 406 (1877).

[2] Story, Eq. Pl. (10th Ed.) § 136; Morgan v. Morgan, 2 Wheat. 297; Roberts v. Marchant, 1 Hare, 547; Chadbourne's Ex'rs v. Coe, 10 U. S. App. 78, 83, 51 Fed. 479, and 2 C. C. A. 327, and cases cited. In general, all persons having any legal or beneficial interest in the subject-matter of the litigation which will be materially affected by the decree are necessary parties complainant or defendant. Gilham v. Cairns, Breese (Ill.) 164. Followed by Herrington v. Hubbard, 1 Scam. (Ill.) 569; Greenup v. Porter, 3 Scam. (Ill.) 64; Scott v. Moore, Id. 306; Willis v. Henderson, 4 Scam. (Ill.) 13; Spear v. Campbell, Id. 424; Bruff v. Leder, 5 Gilm. (Ill.) 210; Hoare v. Harris, 11 Ill. 24; Webster v. French, Id. 254; Skiles v. Switzer, Id. 533; Whitney v. Mayo, 15 Ill. 251; Moore v. School Trustees, 19 Ill. 83, 86; Prentice v. Kimball, Id. 320; Smith v. Rotan, 44 Ill. 506; Volintine v. Fish, 45 Ill. 462; Ryan v. Lynch, 68 Ill. 160; Moore v. Munn, 69 Ill. 591; School Trustees v. Braner, 71 Ill. 546; Hopkins v. Lead Co., 72 Ill. 373; Atkins v. Billings, Id. 597; Rees v. Peltzer, 75 Ill. 475; Chicago & G. W. R. Land Co. v. Peck, 112 Ill. 408; Howell v. Foster, 122 Ill. 276, 13 N. E. 527; Zelle v. Banking Co.,

dispensable parties rests is that already referred to as recognized by all courts, viz. that, before the rights of any one can be directly adjudicated, such person must be before the court, either actually or constructively. The forty-seventh equity rule, while apparently dispensing with the rule under given circumstances, has been held to be no more than an affirmance of the rule.[8]

Illustrations.

A good illustration of necessary or indispensable parties is afforded by a bill to rescind a contract. Here all the parties to the contract are necessary parties; for, if only a part of those inter-

10 Ill. App. 335; Robbins v. Arnold, 11 Ill. App. 434; Wood v. Johnson, 13 Ill. App. 548; Gillett v. Hickling, 16 Ill. App. 392.

[8] The Forty-Seventh equity rule provides that "in all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties, and in such cases the decree shall be without prejudice to the rights of the absent parties." This rule does not apply when indispensable parties are lacking; and, in respect to necessary (i. e. proper, but not indispensable) parties, the cause may or may not be proceeded in without them, as the court may determine in the exercise of a sound discretion. State of California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591. In Chadbourne's Ex'rs v. Coe, 10 U. S. App. 83, 2 C. C. A. 329, and 51 Fed. 481, the court said: "The general rule as to parties in chancery is that parties falling within the definition of necessary parties must be brought in for the purpose of putting an end to the whole controversy, or the bill will be dismissed, and this is still the rule in most of the state courts. But in the federal courts this rule has been released. This relaxation resulted from two causes: First, the limitation imposed upon the jurisdiction of these courts by the citizenship of the parties; second, by their inability to bring in parties out of their jurisdiction by publication. The extent of the relaxation of the general rule in the federal courts is expressed in the forty-seventh equity rule. That rule is simply declaratory of the previous decisions of the supreme court on the subject of the rule. The supreme court has said repeatedly that, notwithstanding this rule, a circuit court can make no decree affecting the rights of an absent person, and that all persons whose interests will be directly affected by the decree are indispensable parties." See, also, Shields v. Barrow, 17 How. 130; Hagan v. Walker, 14 How. 29, 36; Mallow v. Hinde, 12 Wheat. 193, 198; Elmendorf v. Taylor, 10 Wheat. 152, 167.

ested in the contract are before the court, a decree of rescission, unless in a possible case where the interests are clearly separable, would either destroy the rights of those who are absent, or leave the contract in full force as to them, while as to the rest it would be set aside, and they restored to the former condition,—clearly a most inequitable proceeding.[4] So, if the suit is brought to enforce a contract, all the parties to the contract must ordinarily be joined.[5] Where the execution of a decree would throw a cloud upon one's title, such person is an indispensable party.[6] A person in possession of property under a claim of title is a necessary party to a suit affecting such property,[7] and a state is an indispensable party to suits brought against its officers to enforce contracts entered into by them on its behalf.[8] Numerous other instances of necessary parties are cited in the notes.[9] The question whether a

[4] Shields v. Barrow, 17 How. 130; Coiron v. Millaudon, 19 How. 113; Bell v. Donohoe, 17 Fed. 710; Chadbourne v. Coe, 45 Fed. 822; Id., 10 U. S. App. 83, 2 C. C. A. 329, and 51 Fed. 481.

[5] Mallow v. Hinde, 12 Wheat. 193; Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422; Shields v. Barrow, 17 How. 130. To a bill to set aside a joint contract for the development of a mine the several promisors are necessary parties. Smith v. Hawkes, 33 Ill. App. 585.

[6] Young v. Cushing, 4 Biss. 456, Fed. Cas. No. 18,156.

[7] Williams v. Bankhead, 19 Wall. 563; Young v. Cushing, 4 Biss. 456, Fed. Cas. No. 18,156.

[8] See Preston v. Walsh, 10 Fed. 315; Walsh v. Preston, 109 U. S. 297, 3 Sup. Ct. 169, 245. See, also, Cunningham v. Railroad Co., 109 U. S. 446, 3 Sup. Ct. 292, 609; Christian v. Railroad Co., 133 U. S. 233, 10 Sup. Ct. 260; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164. Cf. Williams v. U. S., 138 U. S. 514, 11 Sup. Ct. 457.

[9] The necessary parties to a foreclosure action are the mortgagor, the mortgagee, and those who have obtained interests in the land subsequent to the mortgage. Fifth Ave. Bank of Brooklyn v. Cudlipp, 1 App. Div. 524, 37 N. Y. Supp. 248. When a trustee named in a trust deed providing for a successor in case of his removal, etc., removes from the state, he is not a necessary party to a foreclosure suit. Fisher v. Stiefel, 62 Ill. App. 580. A tenant in possession under the mortgagor is a necessary party on foreclosure of the mortgage. Runner v. White, 60 Ill. App. 247. In a suit to foreclose a deed of trust given to secure the bonds of a corporation, the trustee is not a necessary party. Hammond v. Tarver (Tex. Sup.) 34 S. W. 729. A trustee in a trust deed is a necessary party to a suit for its foreclosure. Subsequent mortgagees are proper, but not necessary, parties.

party is indispensable or not depends largely upon the circumstances of each case. Whenever one's rights will necessarily be affected by the decree sought, such person is an indispensable party.[10] A person is affected by a decree when his rights against or liability to any of the parties to the suit are thereby determined.[11] Thus, in a suit to enforce specific performance of the contract of a

Chandler v. O'Neil, 62 Ill. App. 418. A purchaser of mortgaged property who assumes payment of a portion of the mortgage is a necessary party to an action to foreclose the mortgage. Mudge v. Hull, 56 Kan. 314, 43 Pac. 242. Neither the heirs nor the personal representative of the trustee named in a deed of trust are necessary parties to a bill for its foreclosure. Read v. Rowan, 107 Ala. 366, 18 South, 211. How. Ann. St. § 6704, providing that, when a mortgage debt is secured by the obligation of any person other than the mortgagor, such person may be made a party to an action, and it is not mandatory upon the plaintiff to make an indorser of the note a party defendant in foreclosure. Steele v. Grove (Mich.) 67 N. W. 963. The personal representative of a deceased mortgagor, because by law the mortgage debt is primarily charged on the personal assets, need not be made a party to the foreclosure of the mortgage. Harlem Co-operation Building & Loan Ass'n v. Freeburn (N. J. Ch.) 33 Atl. 514. Where a mortgage is given to secure coupon notes falling due at different periods, the holder of any one note may foreclose when it becomes due, and remains unpaid, without joining as parties the holders of the other notes. Boyer v. Chandler, 160 Ill. 394, 43 N. E. 803. Where the object of the suit is single, and it is shown that some of the defendants have interests in distinct questions growing out of the suit, such defendants are necessary parties, in order to conclude the entire matter. Brown v. Solary, 37 Fla. 102, 19 South. 161. When a bill is filed by a member of an association formed for the purpose of trading in real estate to recover for land sold to the association and conveyed to a trustee for its use, for an account and a partition of lands unsold, the other members of the company are necessary parties. Stevenson v. Mathers, 67 Ill. 123. Upon a bill by a surety to be subrogated to the lien of the creditor upon lands of the principal, the co-sureties are necessary parties. Hook v. Richeson, 115 Ill. 431, 5 N. E. 98. To a bill in equity under St. 1862, c. 218, § 4, to enforce the liability of the officers or stockholders of a corporation for its debts, the corporation must be made a party defendant. Pope v. Leonard (1874), 115 Mass. 286. On a bill for an accounting involving the interests of a deceased partner, the latter must be represented in court. Jenness v. Smith, 58 Mich. 281, 25 N. W. 191.

[10] Chadbourne's Ex'rs v. Coe, 10 U. S. App. 83, 2 C. C. A. 329, and 51 Fed. 481, and cases there cited.

[11] Fost. Fed. Prac. § 53; Morgan's Heirs v. Morgan, 2 Wheat. 290, 297; Roberts v. Marchant, 1 Hare, 547.

deceased vendor, all the heirs of the vendor must be joined;[12] and so, in the case of a deceased vendee, his heirs or devisees, together with his personal representatives, should be joined, as, although the personal estate is primarily chargeable, the real estate, which belongs to the heirs and devisees, may be charged with a deficit,[13] and when it is sought to charge debts upon the real estate of a deceased person which are also chargeable upon the personal estate the executor or administrator must be joined as a party.[14] Generally, whenever there is a community of interest in the parties, which may be affected by a decree, all the proper representatives of that interest are required to be before the court.[15] Persons affected by a common charge or burden must be joined.[16]

Exceptions.

There are certain well-defined exceptions to the general rule that all persons are necessary parties whose interests will be affected by the decree. The rule exists for the purpose of securing justice and equity to all concerned. When the reason of the rule fails, the rule itself likewise fails. It is often practically impossible to bring all persons before the court who, under a strict application of the rule, would be necessary parties, and yet where a refusal to proceed would amount to a denial of all relief to one clearly entitled to it.[17] "The necessity for the relaxation of the rule is more

[12] Townsend v. Champernowne, 9 Price, 130. See, also, Harding v. Handy, 11 Wheat. 104; Jennings v. Jenkins, 9 Ala. 285; Seymour v. Freer, 8 Wall. 202; Roberts v. Marchant, 1 Hare, 547; Morgan's Heirs v. Morgan, 2 Wheat. 290, 297.

[13] Townsend v. Champernowne, 9 Price, 130. See, also, Sawyers v. Baker, 66 Ala. 292; Walters v. Walters, 132 Ill. 467, 23 N. E. 1120.

[14] Story, Eq. Pl. (10th Ed.) § 160; Fordham v. Rolfe, 1 Tam. 1. See Berry v. Askham, 2 Vern. 26; Beall v. Taylor, 2 Grat. (Va.) 532.

[15] Cooper, Eq. Pl. 65; Ward v. Duke of Northumberland, 2 Anst. 469.

[16] See, also, post, p. 51; Story, Eq. Pl. (10th Ed.) § 162; Harris v. Ingledew, 3 P. Wms. 92; Adair v. New River Co., 11 Ves. 429, 444; Avery v. Petten, 7 Johns. Ch. (N. Y.) 211. See, also, Fost. Fed. Prac. (2d. Ed.) §§ 52, 53.

[17] "The principle (of the general rule) being founded in convenience, a departure from it has been said to be justifiable when necessary. And in all these cases the court has not hesitated to depart from it with the view, by original and subsequent arrangement, to do all that can be done for the purposes of justice, rather than hold that no justice shall subsist among persons who may have entered into these contracts." Cockburn v. Thomp-

especially apparent in the courts of the United States, where oftentimes the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever." [18] Whenever, therefore, it is impossible to join all persons falling within the description of necessary parties, but a satisfactory decree can be rendered without manifest injustice to the parties omitted, the court will proceed without them.[19] The impossibility of joining all interested

son, 16 Ves. 321, 329. The rule is rather one of convenience than of right, and is dispensed with where it is extremely difficult or inconvenient to pursue it. Scott v. Moore, 3 Scam. (Ill.) 306. And, as it is adopted for the promotion of justice, it gives way when its application would defeat that end. Webster v. French, 11 Ill. 254. Cf. Willis v. Henderson, 4 Scam. (Ill.) 13. It yields, for instance, where, were it enforced, rights would be defeated through interest in the state, which, by reason of its sovereignty, is exempt from suit. Webster v. French, 11 Ill. 254. "Here is a current of authority adopting more or less a general principle of exception, by which the rule that all persons interested must be parties yields, when justice requires it, in the instance either of plaintiffs or defendants. The rigid enforcement of the rule would lead to perpetual abatements." Meux v. Maltby, 2 Swanst. 277, 284 (leading case). See, also, Wood v. Dummer, 3 Mason, 308, 317, Fed. Cas. No. 17,944; West v. Randall, 2 Mason, 181, 193, Fed. Cas. No. 17,424; Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 344, 349; Good v. Blewitt, 13 Ves. 397.

[18] Payne v. Hook, 7 Wall. 425, 431.

[19] "The general rule is that all persons materially interested, either as plaintiffs or defendants, are to be made parties. There are exceptions, just as old and as well founded as the rule itself. Where the parties are beyond the jurisdiction, or are so numerous that it is impossible to join them all, a court of chancery will make such a decree as it can without them. Its object is to administer justice; and it will not suffer a rule, founded in its own sense of propriety and convenience, to become the instrument of a denial of justice to parties before the court who are entitled to relief. Where it is practicable to bring all interests before it, it will be done. What is impossible or impracticable it has not the rashness to attempt; but it contents itself with disposing of the equities before it, leaving, as far as it may, the rights of other persons unprejudiced." Wood v. Dummer, 3 Mason, 308, 317, Fed. Cas. No. 17,944. "The exceptions, therefore, turn upon the same principle, upon which the rule is founded. They are resolvable into this, either that the court must wholly deny the plaintiff the equitable relief to which he is entitled, or that the relief must be granted without making other persons parties. The latter is deemed the least evil, whenever the

parties usually arises from the fact that they are without the jurisdiction of the court, or unknown to the complainants, or too numerous to be joined without seriously obstructing or defeating the suit.[20] We will now proceed to consider briefly the established exceptions to the rule. It must be premised, however, that, even though a person falls within the description of an excepted class, yet, if this presence is required for the protection of others who have been made parties, the court will not proceed without him.[21] Thus, where an accounting is prayed for, a respondent has the right to insist that all persons interested shall be made parties, in order to dispose of the matter at the time, and thus avoid future litigation with such persons.[22] It should also be noted here that, where persons prima facie necessary parties are omitted, the bill must show upon its face the reason for the nonjoinder.[23]

court can proceed to do justice between the parties before it, without disturbing the rights or injuring the interests of the absent parties, who are equally entitled to its protection. And, even in the cases in which the court will thus administer relief, so solicitous is it to attain the purposes of substantial justice, that it will generally require the bill to be filed, not only in behalf of the plaintiff, but also in behalf of all other persons interested, who are not directly made parties (although in a sense they are thus made so), so that they may come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing." Story, Eq. Pl. (10th Ed.) § 96. See, also, Good v. Blewitt, 13 Ves. 397, 19 Ves. 336; Adair v. New River Co., 11 Ves. 429, 444.

[20] Willis v. Henderson, 4 Scam. (Ill.) 13. Followed in Whitney v. Mayo, 15 Ill. 251; Prentice v. Kimball, 19 Ill. 320; Smith v. Rotan, 44 Ill. 506; Ryan v. Lynch, 68 Ill. 160.

[21] "Persons are necessary parties when no decree can be made respecting the subject-matter of litigation until they are before the court, either as plaintiffs or as defendants, or where the defendants, already before the court, have such an interest in having them made parties as to authorize those defendants to object to proceeding without such parties." Story, Eq. Pl. § 136, and see sections 138, 169; Bailey v. Inglee, 2 Paige (N. Y.) 278. See, also, Madox v. Jackson, 3 Atk. 406; Angerstein v. Clark, 2 Dickens, 738, 3 Swanst. 147, note; Cockburn v. Thompson, 16 Ves. 321, 326; Dunham v. Ramsey, 37 N. J. Eq. 388.

[22] Dart v. Palmer, 1 Barb. Ch. (N. Y.) [illegible]. See, also, Wilcox v. Pratt, 125 N. Y. 688, 25 N. E. 1091; McCabe v. Bellows, 1 Allen (Mass.) 269.

[23] Martin v. McBryde, 3 Ired. Eq. (N. C.) 531; Gilham v. Cairns, Breese (Ill.) 164. General demurrer to a bill against stockholders will not lie for the failure

Same—Persons Whose Interests are Very Small.

It seems that, where a person cannot be joined, he may be omitted, and his interest disregarded, provided it is very small, upon the principle, "De minimis non curat lex." [24] This exception should be very strictly construed.

Same—Interests Created to Deprive Court of Jurisdiction.

Where the interest of one party has been spread among a number for the purpose of thereby defeating the rights of the complainant, the court will proceed without a joinder of such parties. "If a party has divided an interest amongst a number of persons for this purpose, the court, in order that the contrivance may be frustrated and the equitable relief obtained, allows the suit to proceed in their absence. Such division is in reality a fraud,—an attempt to defeat justice by converting the general rule of the court into an obstruction to the ordinary proceedings. The court defeats the fraud by refusing to enforce the general rule." [25] "The rule might, perhaps, be extended here to a case where an attempt has been made to defeat the jurisdiction of the federal court by a merely colorable conveyance to a person of the same citizenship as the complainant." [26]

Same—Persons Who Consent to Decree.

Persons who consent to the decree sought are not necessary parties.[27] The fact of their consent should be alleged in the bill.[28] So one who disclaims any interest in the controversy may be omitted.[29]

to bring in all the stockholders as defendants, if the bill purports to be filed against all, and presents a sufficient excuse for not naming some of them. Brewer v. Association, 58 Mich. 351, 25 N. W. 374.

[24] See Union Bank of Louisiana v. Stafford, 12 How. 327; New Orleans Canal & Banking Co. v. Stafford, Id. 343; Daws v. Benn, 1 Jac. & W. 513; Attorney General v. Goddard, 1 Turn. & R. 348.

[25] Calv. Parties (2d Ed.) p. 61, c. 4. See, also, Yates v. Hambly, 2 Atk. 237; Union Bank of Louisiana v. Stafford, 12 How. 327.

[26] Fost. Fed. Prac. (2d Ed.) § 54, citing Union Bank of Louisiana v. Stafford, 12 How. 327; New Orleans Canal & Banking Co. v. Stafford, Id. 343; Leather Manuf'rs' Nat. Bank v. Cooper, 120 U. S. 778, 7 Sup. Ct. 777.

[27] Mechanics' Bank v. Seton, 1 Pet. 299.

[28] Fost. Fed. Prac. (2d Ed.) § 55.

[29] Vattier v. Hinde, 7 Pet. 252; Mechanics' Bank of Alexandria v. Seton, 1 Pet. 299. Cf. Rylands v. Latouche, 2 Bligh, 579.

Same—Persons against Whom Rights are Waived.

Where the complainant waives his rights against one who would otherwise be a necessary party defendant, such person may be omitted, provided it will not result in prejudice to others who are made parties.[30]

Same—Persons Legally Represented.

In some cases, a court of equity will consider certain parties before the court as the representatives of all other persons interested, so far, at least, as to bind their interests, although they are not and cannot be made parties.[31] This is the most important of all the exceptions to the rule under consideration; for here a person is bound although he has had no opportunity to be heard, and is only constructively before the court, while in all the other exceptions considered the parties omitted are either not substantially affected, or are affected by reason of their own act, as where they have consented to the decree, or acquired their interests in fraud of the court's jurisdiction.[32]

Illustrations of this class of cases are numerous. Thus, executors and administrators represent the creditors and distributees in suits by or against them in their representative capacity.[33] So

[30] Williams v. Williams, 9 Mod. 299; Anon., 2 Eq. Cas. Abr. 166, pl. 7; Story, Eq. Pl. §§ 139, 228. Persons against whom no decree is sought may sometimes be omitted. See Equity Rule 50; Story, Eq. Pl. §§ 87, 139; Williams v. Whinyates, 2 Brown, Ch. 399; Harris v. Ingledew, 3 P. Wms. 91.

[31] "It is not to be understood that such a decree absolutely binds the absent creditors, legatees, or distributees, who have had no opportunity of proving and presenting their claims so that they are entitled to no redress, but are deemed to be concluded. On the contrary, although they have no remedy against the executor or administrator or trustee, yet they have a right to assert their claim to a share in the property against the creditors, legatees, or distributees who have received it." Story, Eq. Pl. (10th Ed.) § 106. The court is solicitous to protect the interests of absent persons not parties. See Good v. Blewitt, 13 Ves. 397; Angell v. Haddon, 1 Madd. 529, Dunch v. Kent, 1 Vern. 260. The waiver may be made at the hearing. Pawlet v. Bishop of Lincoln, 2 Atk. 296; Northey v. Northey, Id. 77.

[32] See ante, p. 27.

[33] Potter v. Gardner, 12 Wheat. 490; Dandridge v. Washington, 2 Pet. 370; Wainwright v. Waterman, 1 Ves. Jr. 311, 313; Brown v. Dowthwaite, 1 Madd. 446, 448. But see Faithful v. Hunt, 3 Anstr. 751; Attorney General v. Wynne, Mos. 126. To a bill by an administrator against persons alleged

an assignee for creditors represents the insolvent debtor and his creditors.[34] A receiver likewise represents creditors.[35] So the first tenant in tail in esse represents all persons claiming subsequent estates in remainder or reversion, after such vested estate of inheritance.[36] "A court of equity in many cases considers the tenant in tail as having the whole estate vested in him, at least for the purposes of suit, and for these purposes does not look beyond the estate tail in a suit aiming by the decree to bind the right to the land."[37] It is immaterial whether the bill is brought by or against the tenant in tail. In either case he represents the subsequent interests, and a decree for or against him will bind those in remainder or reversion, although by the failure of all the previous estates the estates in remainder or reversion may afterwards vest in possession.[38] "If there be no such tenant in tail in being, the first person in being entitled to the inheritance should be made a party, and, if there be no such person in being, then the tenant for life; and in such a case the decree made will bind the other persons not in being.[39] * * * So, where there are con-

to have been agents of his intestate, for an accounting of their agency, the heirs of the intestate are not necessary parties because of their interest; their interest is represented by the administrator. Sturgeon v. Burrall, 1 Ill. App. 537.

[34] Spragg v. Binkes, 5 Ves. 583, 587. Where the creditors of an insolvent debtor, who were parties to an assignment for their benefit, were numerous, and some resided out of the commonwealth, and the residence of others was unknown, it was held sufficient, in a bill concerning the assets, to make the debtor and the assignees parties, without joining the creditors. Stevenson v. Austin, 3 Metc. (Mass.) 474 (1842).

[35] Doggett v. Railroad Co., 99 U. S. 72. Surviving partners represent the personal representatives of deceased partners. Pagan v. Sparks, 2 Wash. C. C. 325, Fed. Cas. No. 10,659.

[36] Story, Eq. Pl. § 144; Calv. Parties, 56; Lloyd v. Johnes, 9 Ves. 37, 65. See Sohier v. Williams, 1 Curt. 479, 493, Fed. Cas. No. 13,159. "Those in remainders were considered as cyphers." Reynoldson v. Perkins, Amb. 564.

[37] Lloyd v. Johnes, 9 Ves. 37, 57.

[38] Story, Eq. Pl. § 144; Cockburn v. Thompson, 16 Ves. 321, 326; Lloyd v. Johnes, 9 Ves. 37, 57; Reynoldson v. Perkins, Amb. 564, 565. See, also, Giffard v. Hort, 1 Schoales & L. 386, 408, 411; Osborne v. Usher, 6 Brown, Parl. Cas. 20, 26.

[39] Cooper, Eq. Pl. 36; Giffard v. Hort, 1 Schoales & L. 386, 407. And see Dursley v. Fitzhardinge, 6 Ves. 251. If there be a tenant for life of an un-

tingent limitations and executory devises to persons not in being, they may in like manner be barred by a decree against a person claiming a vested estate of inheritance."[40] And generally persons having subsequent vested or contingent interests are represented by the tenant of the first estate of inheritance.[41]

The general rule in suits affecting trust property is that both the trustee and the beneficiaries should be made parties.[42] So, in

divided share of an estate, with remainders to his unborn sons in tail, the tenant for life may maintain a bill for partition, and the decree will be binding upon his sons when they come in esse. Gaskell v. Gaskell, 6 Sim. 643.

[40] Story, Eq. Pl. § 145; Coop. Eq. Pl. 36, 77-83; Mitf. Eq. Pl. (Jeremy, Ed.) 173, 174.

[41] Story, Eq. Pl. § 146; Lloyd v. Johnes, 9 Ves. 52, 57, 58, 60, 61; Wingfield v. Whaley, 1 Brown, Parl. Cas. 200. "But courts of equity are very scrupulous of affecting the interest of persons not before the court in cases of this sort, where their interest is not dependent upon the prior estate of inheritance, and it is practicable to make them parties. Hence this principal of virtual representation does not apply to cases where a person seised in fee is liable to have that seisin defeated by a shifting use, or conditional limitation, or executory devise; for in such cases the estate is not sufficiently represented in equity by persons having the first estate of inheritance, but the persons entitled to such use, limitation, or devise, if in esse, must also be made parties." Story, Eq. Pl. § 147. See, also, Grace v. Terrington, 1 Coll. 3; Goodess v. Williams, 2 Younge & C. Ch. 595.

[42] Story, Eq. Pl. § 207; Daniell, Ch. Pl. & Prac. 192. The trustees have the legal interest, and therefore they are necessary parties (Neilson v. Churchill, 5 Dana [Ky.] 341; Johnson v. Rankin, 2 Bibb. [Ky.] 184; Harlow v. Mister, 64 Miss. 25, 8 South. 164; Carter v. Jones, 5 Ired. Eq. [N. C.] 196; Malin v. Malin, 2 Johns. Ch. [N. Y.] 238; Fish v. Howland, 1 Paige [N. Y.] 20; Cassiday v. McDaniel, 8 B. Mon. [Ky.] 519. See, also, Wood v. Williams, 4 Madd. 186; Scott v. Nicholl, 3 Russ. 476); for, if they were not, their legal rights would not be bound by the decree, and they might annoy the defendant by asserting their right in an action at law, to which the decree in equity, being res inter alias acta, would be no answer, and the defendant would be obliged to resort to another proceeding in a court of equity to restrain the plaintiff at law from proceedings to enforce a demand which has been already satisfied under the decree in equity (Daniell, Ch. Pl. & Prac. 192). A suit cannot be brought by the trustee "to the use of" the beneficial owner, but the latter must sue, for he is the real party in interest. Kitchins v. Harrall, 54 Miss. 474. Cestuis que trustent may be sole plaintiffs, where trustee claims adversely and is made a defendant. Webb v. Rail-

actions between trustees and any of their beneficiaries, "the general rule is that all the trustees and all the cestuis que trustent must be before the court, either as plaintiffs or defendants." [43] There are many exceptions to these rules. Where the only object of the suit is to transfer the property into the possession of the trustees, it seems that the beneficiaries are not necessary, though they are proper, parties, while in suits affecting the existence of the trust property the beneficiaries are necessary parties.[44] In the

road Co., 9 Fed. 793. The cestuis que trustent or beneficiaries have the equitable and ultimate interest to be affected by the decree, and therefore they are necessary parties. Adams v. St. Leger, 1 Ball & B. 181; Burt v. Dennet, 2 Brown, Ch. 225; Stillwell v. M'Neely, 2 N. J. Eq. 305; Tyson v. Applegate, 40 N. J. Eq. 305; Gordon v. Green, 113 Mass. 259; Holland v. Baker, 3 Hare, 68, 72. "In cases, therefore, where an assignment does not pass the legal title, but only the equitable title, to the property (as, for example, an assignment of a chose in action), it is usual, if it be not always indispensable, to make the assignor, holding the legal title, a party to the suit." Story, Eq. Pl. § 153. See, also, Daniell, Ch. Pl. & Prac. 197; Chaffraix v. Board of Liquidation, 11 Fed. 638; Bradley v. Morgan, 2 A. K. Marsh. (Ky.) 369; Vorhees v. De Myer, 3 Sandf. Ch. (N. Y.) 614; Elderkin v. Shultz, 2 Blackf. (Ind.) 345. Generally, as to the suits by assignees, see Rogers v. Insurance Co., 6 Paige (N. Y.) 583; Lynchburg Iron Co. v. Tayloe, 79 Va. 671; Walker v. Brooks, 125 Mass. 241; Hagar v. Buck, 44 Vt. 285; Ontario Bank v. Mumford, 2 Barb. Ch. (N. Y.) 596; Hammond v. Messenger, 9 Sim. 327; Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544; Hayes v. Hayes, 45 N. J. Eq. 461, 17 Atl. 634; Smith v. Brittenham, 109 Ill. 540; Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. 643; McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652.

[43] Perry, Trusts, § 875; Story, Eq. Pl. § 207; Sears v. Hardy, 120 Mass. 524. In actions by beneficiaries for breach of trust, all the beneficiaries should be made parties (Bliss, Code Pl. § 109); and, if any of them are deceased, their personal representative must be joined with those surviving (Petrie v. Petrie, 7 Lans. [N. Y.] 90; Sherman v. Parish, 53 N. Y. 483). "Where there is a general trust for creditors, or others, whose demands are not distinctly specified in the creation of the trust, as their number, as well as the difficulty of ascertaining who may answer a general description, might greatly embarrass the due execution of the trust, courts of equity will dispense with all the creditors, and others interested in the trust, being made direct parties." Story, Eq. Pl. § 216.

[44] Fost. Fed. Prac. (2d Ed.) § 45, citing Carey v. Brown, 92 U. S. 171; Harrison v. Rowan, 4 Wash. C. C. 202, Fed. Cas. No. 6,143; Morey v. Forsyth, Walker (Mich.) 465; Franco v. Franco, 3 Ves. 76. See, also, Adams v. Brad-

federal courts the practice on this subject is affected by equity rule 49, which provides: "In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate or rents and profits, parties to the suit. But the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such per-

ley, 12 Mich. 346; Newark Sav. Inst. v. Jones' Ex'rs, 35 N. J. Eq. 406; Ashton v. Bank, 3 Allen (Mass.) 217; Hickox v. Elliott, 10 Sawy. 415, 22 Fed. 13; Waring v. Turton, 44 Md. 535; Horsley v. Fawcett, 11 Beav. 565. Cestuis que trustent are not necessary parties when the only object of the suit is to reduce the property into possession, or to collect money. Sill v. Ketchum, Har. (Mich.) 423; Cook v. Wheeler, Har. (Mich.) 443; Martin v. McReynolds, 6 Mich. 70; Adams v. Bradley, 12 Mich. 346. A trustee may maintain a bill in equity to redeem a mortgage, made by himself, of the trust estate, without making his cestui que trust a party to the bill. Boyden v. Partridge, 2 Gray (Mass.) 190 (1854). In a bill by a trustee to recover trust property from one to whom a deceased former trustee pledged it to secure his own debt, it is not necessary to join as defendants the cestuis que trustent, or the widow of personal representatives of the former trustee, or the sureties on his bond. Ashton v. Bank, 3 Allen (Mass.) 217 (1861). Cestuis que trustent are necessary parties where the existence or enjoyment of trust property is to be affected by the prayer of the bill. Cook v. Wheeler, Har. (Mich.) 443. In general the cestuis que trustent must be made parties. There are some cases where a trustee may sue without naming the cestui que trust, but the cestui que trust must be named where the object is to divest them of title. If the demand existed on the trust fund before the trust was created, a suit may be sustained against the trustee only. Platt v. Oliver, 2 McLean, 267, Fed. Cas. No. 11,115. The person secured by a deed of trust is a necessary party to a suit by which his security is to be affected; the trustee, though a proper party, is hardly to be deemed a proper representative of his interest. Ridenour v. Shideler, 5 Ill. App. 180. On a bill in equity against a trustee under a will to establish a resulting trust in the bulk of the estate, the court will order persons, who may claim the same as cestuis que trustent under the will, to be made parties defendant. Sears v. Hardy (1876) 120 Mass. 524.

sons to be made parties." Where the beneficiaries are very numerous, as in the case of trustees to secure bondholders, the trustees sufficiently represent the beneficiaries.[45] In a suit by a stranger against a trustee to defeat the trust altogether, the cestui que trust is not a necessary party defendant, if the powers or duties of the trustee with respect to the execution of the trust are such that those for whom he holds will be bound by what is done against him as well as what is done by him.[46] So those who have demands prior to the creation of the trust may enforce them against the trustees without bringing in the beneficiaries, if the trustees have the absolute disposition of the property.[47] But if they have no such power, as in case of trustees to convey to certain uses, the beneficiaries must be made parties.[48] So the beneficiary is not a necessary party to a bill to quiet title brought against the heirs of a trustee by a person to whom the trustee had conveyed trust property.[49]

Where persons have a common interest in the property in controversy, or are said to claim under a common right by reason of a common interest in the settlement of some disputed question, without a common interest in the property involved, and are very numerous, one or more may sue or defend on behalf of themselves and all others similarly situated.[50] Thus, one or more

[45] Chicago & G. W. Railroad Land Co. v. Peck, 112 Ill. 408; Van Vechten v. Terry, 2 Johns. Ch. (N. Y.) 197; Kerrison v. Stewart, 93 U. S. 155; Shaw v. Railroad Co., 100 U. S. 605; Beals v. Railroad Co., 133 U. S. 290, 10 Sup. Ct. 314; Elwell v. Fosdick, 134 U. S. 500, 10 Sup. Ct. 598; Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688, 10 Sup. Ct. 708. A beneficiary may be made a party upon application. Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638. A bondholder is not entitled to foreclose a mortgage by which he is secured, merely because of delay of the trustee, no request having been made to the trustee to foreclose. Beebe v. Power Co., 13 Misc. Rep. 737, 35 N. Y. Supp. 1.

[46] Vetterlein v. Barnes, 124 U. S. 169, 8 Sup. Ct. 441; Kerrison v. Stewart, 93 U. S. 155; Smith v. City of Portland, 30 Fed. 734; Vetterlein v. Barker, 45 Fed. 741; Winslow v. Railroad Co., 4 Minn. 313 (Gil. 230); Rogers v. Rogers, 3 Paige (N. Y.) 379; Hunt v. Weiner, 39 Ark. 70.

[47] Story, Eq. Pl. §§ 149, 207, 215, 216; Kerrison v. Stewart, 93 U. S. 155.

[48] Story, Eq. Pl. § 149; Bliss, Code Pl. § 109b.

[49] Gridley v. Wynant, 23 How. 500.

[50] Fost. Fed. Prac. § 46; Story, Eq. Pl. § 97. See People v. Sturtevant, 9

stockholders in a corporation, or partners or creditors or bondholders, may sue on behalf of themselves and others similarly situated, where the members of the class are very numerous.[51] But, where property was mortgaged directly to 15 named bondholders, it was held that one could not sue on behalf of himself and others, but that all must join in the bill.[52] So, in the case of numerous persons jointly liable, it is sufficient if enough are brought before the court to fairly represent the interests of all, where those interests are of a common character and responsibility.[53] Thus, a cred-

N. Y. 263; Newcomb v. Horton, 18 Wis. 566; West v. Randall, 2 Mason, 181, Fed. Cas. No. 17,424. When it is apparent that the parties who may be affected by the decree are very numerous, and that to require the joinder of all who may be interested will be virtually to deny any remedy to a complainant, their joinder will not be insisted upon. Pettibone v. McGraw, 6 Mich. 441, 445. Where the persons interested in the subject-matter of a suit in equity are numerous, it is within the discretion of the court to determine whether or not they should be made parties. Smith v. Williams (1875) 116 Mass. 510.

[51] Bills by stockholders: Bacon v. Robertson, 18 How. 480; Hazard v. Durant, 11 R. I. 195; Crease v. Babcock, 10 Metc. (Mass.) 525, 532; Hersey v. Veazie, 24 Me. 1; Wallworth v. Holt, 4 Mylne & C. 619; Western R. Co. v. Nolan, 48 N. Y. 513; Atlanta Real-Estate Co. v. Atlanta Nat. Bank, 75 Ga. 40; Menier v. Telegraph Works, 9 Ch. App. 350; Bagshaw v. Railroad Co., 7 Hare, 114. Bills by members of unincorporated associations: Story, Eq. Pl. § 107; Mandeville v. Riggs, 2 Pet. 482, 487; Mann v. Butler, 2 Barb. Ch. (N. Y.) 362; West v. Randall, 2 Mason, 181, 194, Fed. Cas. No. 17,424; Barker v. Walters, 8 Beav. 92; Bainbridge v. Burton, 2 Beav. 539; Birmingham v. Gallagher, 112 Mass. 190; Hichens v. Congreve, 4 Russ. 562; Chancey v. May, Prec. Ch. 592; Martin v. Dryden, 1 Gilman (Ill.) 187. Bondholders: Central R. & B. Co. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387; Galveston R. R. v. Cowdrey, 11 Wall. 459. Creditors and legatees: Fink v. Patterson, 21 Fed. 602; Wakeman v. Grover, 4 Paige (N. Y.) 23; Ross v. Crary, 1 Paige (N. Y.) 416; Cockburn v. Thompson, 16 Ves. 321; Dandridge v. Washington's Ex'rs, 2 Pet. 370. As to residuary legatees, see Hallett v. Hallett, 2 Paige (N. Y.) 15; Pray v. Belt, 1 Pet. 670; Brown v. Ricketts, 3 Johns. Ch. (N. Y.) 553, 555; Kettle v. Crary, 1 Paige (N. Y.) 416, note. A member of a class for whose benefit a charity was founded may maintain a suit on behalf of himself and all the other members of the class. Smith v. Swormstedt, 16 How. 288.

[52] Railroad Co. v. Orr, 18 Wall. 471.

[53] Story, Eq. Pl. § 116. See, also, Meux v. Maltby, 2 Swanst. 277, 284; Cockburn v. Thompson, 16 Ves. 321, 328; Railroad Co. v. Howard, 7 Wall. 392; Mandeville v. Riggs, 2 Pet. 482; Wood v. Dummer, 3 Mason, 308, 315, Fed. Cas. No. 17,944; Ayres v. Carver, 17 How. 591.

itor may maintain a bill against the committee of a voluntary club or association without joining the other members of the club, when the latter are numerous or unknown.[54] In the federal courts the practice in such cases is regulated by equity rule 48, which is as follows: "When the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties." [55] In cases of this kind the bill must show that the suit is thus brought individually and on behalf of others,[56] and that they are too numerous to be joined; and, if one or more of a class is sued, the names of all in that class should be given, and the court requested to select those who are to be served with process and to defend the suit.[57]

[54] Cullen v. Queensberry, 1 Brown, Ch. 101; Cousins v. Smith, 13 Ves. 544. "In such a case, it seems proper, if indeed it be not indispensable, to charge in the bill that the members are numerous, and many unknown." Story, Eq. Pl. § 116. See, also, Lanchester v. Thompson, 5 Madd. 4, 12, 13. A bill may be brought on behalf of a voluntary association, the individual members of which are too numerous to be joined as plaintiff, in the name of a few, for themselves and all the other members. Birmingham v. Gallagher (1873) 112 Mass. 190; Snow v. Wheeler (1873) 113 Mass. 179; Martin v. Dryden, 1 Gilman (Ill.) 187. Followed by Whitney v. Mayo, 15 Ill. 251.

[55] See McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652.

[56] Ayres v. Carver, 17 How. 591; Lanchester v. Thompson, 5 Madd. 4, 12, 13; Story, Eq. Pl. § 116. The bill should be filed in behalf of interested persons not joined, so that they may come in under the decree. Whitney v. Mayo, 15 Ill. 251. If a bill in equity is brought in behalf of the plaintiff and such others having a like interest as may come in to prosecute the suit, and no others come in, the plaintiff, in order to maintain his bill, must show that he is himself entitled to equitable relief. Hubbell v. Warren (1864) 8 Allen (Mass.) 173.

[57] Ayres v. Carver, 17 How. 591.

SAME—PROPER BUT NOT INDISPENSABLE PARTIES.

11. Persons, though not necessary or indispensable parties, may sometimes be proper parties.

12. Proper but not indispensable parties may be divided into two classes:

(a) Persons who may be made parties or not at the option of complainant.

(b) Persons who must be made parties if they can be reached.

13. FORMAL PARTIES—Persons having no interest in the particular question at issue, but who have an interest in the subject-matter of the suit, which may be conveniently settled in the suit, may be made parties or not at the option of complainant. Such persons are called "formal parties."

14. PARTIES WITH SEPARABLE INTERESTS—Persons who are interested in the controversy, but whose interest is such that the controversy can be satisfactorily determined as to those made parties without prejudicing the rights of those not made parties, are necessary parties, if they can be reached, but otherwise the court will proceed without them.

Formal Parties.

Formal or nominal parties are those who have no connection with the main controversy,—that is, no real interest in the question at issue,—but who still have an interest of some kind in the subject-matter of the suit, and are often made parties for purposes of convenience and to prevent future litigation.[1] Thus, if a trus-

§§ 11–14. [1] Williams v. Bankhead, 19 Wall. 563. See, also, Taylor v. Holmes, 14 Fed. 498; Chadbourne's Ex'rs v. Coe, 10 U. S. App. 78, 83, 2 C. C. A. 327, 51 Fed. 479, and cases cited. Where the owner of land mortgages the same, and afterwards conveys it to another, if his wife joins in the conveyance she need not be made a party to a suit to foreclose the mortgage. Koerner v. Gauss, 57 Ill. App. 668. The wife is a proper party to a bill filed by the husband to

tee has fraudulently or improperly parted with the trust property, the assignee to whom such property was transferred is only a nominal party to a suit by the cestuis que trustent against the trustee.[2] And in cases of assignment by act of the parties the assignor is generally a formal or nominal party wherever the assignment is absolute and unconditional, divesting him of all equitable interest, and its extent and validity are unquestioned.[3] The same is also generally true of assignees pendente lite, who are bound by a decree affecting parties to the suit under whom they claim, though it is often important that they be brought in for the proper determination of the controversy.[4] Generally, neither their joinder nor omission can be made ground of objection to the bill, and, as they are thus really upon neither side of the controversy, it is optional with the complainant to join them or not. If joined, that fact cannot oust the jurisdiction of the court, nor, if omitted, will it prevent the rendition of the decree, and they may always be omitted when without the jurisdiction.[5]

protect the homestead against a mortgage not signed by her. Shoemaker v. Gardner, 19 Mich. 96.

[2] Wormley v. Wormley, 8 Wheat. 421; Walden v. Skinner, 101 U. S. 577.

[3] Story, Eq. Pl. § 153. See Whitney v. McKinney, 7 Johns. Ch. (N. Y.) 144; Miller v. Bear, 3 Paige (N. Y.) 467; Trecothick v. Austin, 4 Mason, 41, Fed. Cas. No. 14,164. See Cole v. Lake Co., 54 N. H. 242. The promisee named in a written contract, who has transferred it by an unconditional verbal assignment, need not be made a party to a suit by his assignee for specific performance of the contract. Currier v. Howard (1860) 14 Gray (Mass.) 511. Where the judgment creditor has assigned the demand upon which the judgment was rendered, to secure a debt of equal amount, the assignee alone, or those succeeding to his rights, can bring suit in equity to enforce the judgment. Andrews v. Kibbee, 12 Mich. 94. A mortgagee who has assigned the debt and mortgage is a proper, though not a necessary, party to an action by the assignee to foreclose. Merrill v. Bischoff, 3 App. Div. 361, 38 N. Y. Supp. 194. To a bill to set aside a deed of lands for fraud, the grantee, who has conveyed his title, is a proper, though not perhaps a necessary, party. Buchoz v. Lecour, 9 Mich. 234. In a bill in equity by the assignee of a chose in action, the assignor is a necessary party, if there remains any right or liability in the assignor which may be affected by the decree. Montague v. Lobdell (1853) 11 Cush. (Mass.) 111. And see Currier v. Howard, 14 Gray (Mass.) 511, 513.

[4] Phœnix Mut. Life Ins. Co. v. Batchen, 6 Ill. App. 621.

[5] Story, Eq. Pl. § 156; Wormley v. Wormley, 8 Wheat. 421. See, also, Walden v. Skinner, 101 U. S. 577; Bacon v. Rives, 106 U. S. 99, 1 Sup. Ct. 3;

Parties with Separable Interests.

The second class of persons who are proper but not indispensable parties are those who must be made parties if possible, but without whom the court will proceed to a decree if it is impracticable to join them. Such persons are often loosely designated as "necessary parties," though the term is not used in its full significance. They are necessary parties only if they can be reached; otherwise they may be omitted. They have been defined as "persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the whole controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed 'necessary parties'; but, if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice without affecting other persons not before the court, the latter are not indispensable parties." [6] Persons of this class are thus more than mere formal or nominal parties, since they must be joined if the power of the court can reach them, but are still not indispensable, as, by reason of the fact that their interests are separable, the controversy may still be properly disposed of as to those before the court. Persons with separable interests constitute an exception to the general rule, already given, that all persons interested in the subject-matter of the controversy should be made parties. A rule established to secure equity will not be so applied as to work inequity. Whenever, therefore, persons who ordinarily should be made parties cannot be reached, they may be omitted, if their interests are separable.[7] The line between this

Taylor v. Holmes, 14 Fed. 498; Pacific R. R. v. Ketchum, 101 U. S. 289. The husband of a married woman may join with her as plaintiff in a bill in equity, in a case in which he has no interest. Burns v. Lynde (1863) 6 Allen (Mass.) 305. The nonjoinder of one who, by reason of a nominal or formal interest, might properly have been joined, is not fatal, where entire justice can be done without him. Starne v. Farr, 17 Ill. App. 491.

[6] Per Mr. Justice Curtis in Shields v. Barrow, 17 How. 130, 139. See, also, Williams v. Bankhead, 19 Wall. 563; Chadbourne's Ex'rs v. Coe, 10 U. S. App. 78, 83, 2 C. C. A. 327, and 51 Fed. 479.

[7] Hays v. Humphreys, 37 Fed. 283; Traders' Bank v. Campbell, 14 Wall. 87; West v. Randall, 2 Mason, 181, 192, Fed. Cas. No. 17,424. One out of

class of persons, who are only sometimes strictly necessary parties, and the first class, who are always necessary parties, is difficult to draw, for the reason that the test whether a person stands in the one class or the other must depend, in many instances, upon the particular circumstances of the case, and persons who, if classed by their interest alone, might not be necessary parties, their interests being separable, may become indispensable because their presence is necessary to the protection of others.[8]

"The doctrine ordinarily laid down on this point is that where the persons who are out of the jurisdiction are merely passive objects of the judgment of the court, or their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the decree, or if they have rights wholly distinct from those of the other parties, or if the decree ought to be pursued against them, then the court cannot properly proceed to a determination of the whole cause without their being

the jurisdiction need not be made a party, if a decree can be made without manifest injustice to him. Towle v. Pierce, 12 Metc. (Mass.) 329. In such case the relief granted will be so molded as not to affect the absent party's interest. Mechanics' Bank v. Seton, 1 Pet. 299; Cameron v. McRoberts, 3 Wheat. 591. "Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party, if possible, and the court will not proceed to a decree without him if he can be reached." Williams v. Bankhead, 19 Wall. 563, 571. The omission of parties who cannot be reached is authorized by equity rule 47, and Rev. St. U. S. § 737, but the rule and statute amount merely to a reaffirmance of the rule which prevails independently of them. They do not authorize a decree, in the absence of indispensable parties. Shields v. Barrow, 17 How. 130. See, also, Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422; Wall v. Thomas, 41 Fed. 620. The rule that prohibits a court of equity from making a decree, unless all those who are substantially interested are made parties to the suit, is inapplicable in a case where it is not in the power of the complainants to make them parties. Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225.

[8] The nature of the rule and the reasons for its adoption are clearly stated in Elmendorf v. Taylor, 10 Wheat. 152, and Mallow v. Hinde, 12 Wheat. 193. See, also, Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422; Wall v. Thomas, 41 Fed. 620; Gregory v. Swift, 39 Fed. 708; Conolly v. Wells, 33 Fed. 205.

made parties. And, under such circumstances, their being out of the jurisdiction constitutes no ground for proceeding to any decree against them, or their rights or interests; but the suit, so far, at least, as their rights and interests are concerned, should be stayed; for to this extent it is unavoidably defective." [9]

In the case of a breach of trust by several trustees who are all implicated, the liability of such trustees is joint and several, and therefore, in a suit by the cestui que trust for equitable relief, he may join one or all as respondents.[10] So, in a suit to foreclose a mortgage, persons having liens subsequent to that of the mortgage, as second mortgagees, are not indispensable parties.[11] And a stockholder, suing in equity to restrain a corporation from acting beyond its authority and in violation of his rights, need not join the directors of such corporation, unless he seeks relief against them also.[12] So where a bill was brought in the federal court in Kentucky against three parties, one of whom was stated to be a citizen of Virginia, but the citizenship of the other two was not mentioned, it was held by the United States supreme court that if the one whose citizenship was thus given had a distinct interest in the subject-matter of the controversy, so that substantial justice could be done, so far as he was interested, without affecting the other two, the jurisdiction of the court might be exercised as to him alone, but that, if the interest of all was joint, the circuit court had no jurisdiction to proceed, the two whose residence was not stated being citizens of the same state as the complainant.[13] Again, when a bill was filed by some of the heirs of a deceased person to set aside a deed procured from the ancestor by fraud, and the court ordered a sale of the estate to pay the charges equitably

[9] Story, Eq. Pl. § 81. See, also, Cassidy v. Shimmin, 122 Mass. 406.

[10] Heath v. Railway Co., 8 Blatchf. 347, Fed. Cas. No. 6,306. See Parsons v. Howard, 2 Woods, 1, Fed. Cas. No. 10,777; Hazard v. Durant, 19 Fed. 471.

[11] See Brewster v. Wakefield, 22 How. 118; Howard v. Railway Co., 101 U. S. 837. The holder of a mortgage, filing a bill to foreclose the same, need not make other mortgagees parties. The right of those whose mortgages have precedence over his he cannot disturb, and his bill will affect the rights of only such subsequent mortgagees as he makes parties to his suit. Chandler v. O'Neil, 62 Ill. App. 418.

[12] Heath v. Railway Co., 8 Blatchf. 347, Fed. Cas. No. 6,306.

[13] Cameron v. McRoberts, 3 Wheat. 591.

due the grantee for advances, etc., it was held necessary that all the heirs should be made parties before such sale could be ordered; but it was also provided that, if all such heirs could not be brought before the court, a sale was to be made of the undivided interests of those who did appear.[14] The test applicable, though not always easy to apply, is the joint or several nature of the interest by reason of which the general rule we have first stated requires a joinder; and if it is a separable one, so that the rights of each person are susceptible of a distinct and independent adjudication, any who are beyond the jurisdiction of the court may be omitted.[15]

Same—When Persons with Separable Interests may be Omitted.

As has been intimated, persons of the class under consideration under some circumstances are necessary parties, without whom the court will not proceed, while under other circumstances they are not indispensable parties, and the court will proceed without them. In other words, the class constitutes an exception to the general rule that all persons interested in the subject-matter of the suit or the object of the bill should be made parties. The exception rests upon the principle that, as the object of the general rule is to insure justice between all parties in interest, courts of equity will not suffer it to be so applied as to work injustice.[16] If the court can dispose of the merits of the case before it without prejudice to the rights or interests of other persons who are not parties, and it is wholly impracticable to make such persons parties, to apply the rule would result in gross injustice; it would amount to a denial of equity.[17] "On the other hand, if complete

[14] See Handy v. Harding, 11 Wheat. 103.

[15] See, generally, Cameron v. McRoberts, 3 Wheat. 591; Gridley v. Wynant, 23 How. 500; Hazard v. Durant, 19 Fed. 471; Parsons v. Howard, 2 Woods, 1, 5, Fed. Cas. No. 10,777; Darwent v. Walton, 2 Atk. 510; Prout v. Roby, 15 Wall. 471.

[16] Story, Eq. Pl. § 77; Cockburn v. Thompson, 16 Ves. 321; West v. Randall, 2 Mason, 181, 190, Fed. Cas. No. 17,424; Elmendorf v. Taylor, 10 Wheat. 152; Hallett v. Hallett, 2 Paige (N. Y.) 15; Brasher's Ex'rs v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 242, 245; Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 349.

[17] Story, Eq. Pl. § 78. In Wood v. Dummer, 3 Mason, 317, Fed. Cas. No. 17,944, the general rule, and the exceptions to it, were summed up in the

justice between the parties before the court cannot be done without others being made parties, whose rights or interests will be prejudiced by a decree, then the court will altogether stay its proceedings, even though those other parties cannot be brought before the court; for in such cases the court will not, by its endeavors to do justice between the parties before it, risk the doing of positive injustice to other parties not before it, whose claims are, or may be, equally meritorious." [18]

The exception, therefore, rests upon the utter impracticability of making all interested persons parties, and the possibility of doing substantial equity without them. There are several cases in which it is impracticable to make interested persons parties. It is obviously so when such persons are without the jurisdiction of the court, and consequently cannot be reached by its process. In such a case, to require such persons to be made parties would be equivalent to a dismissal of the suit, and amount to a denial of justice. Therefore, if persons prima facie necessary parties are out of the jurisdiction, they may be dispensed with, provided their interests will not be prejudiced by the decree, and they are not indispensable to the just ascertainment of the merits of the case

following language: "The general rule is that all persons materially interested, either as plaintiffs or defendants, are to be made parties. There are exceptions, just as old and as well founded as the rule itself. Where the parties are beyond the jurisdiction, or are so numerous that it is impossible to join them all, a court of chancery will make such a decree as it can without them. Its object is to administer justice; and it will not suffer a rule, founded in its own sense of propriety and convenience, to become the instrument of a denial of justice to parties before the court who are entitled to relief. What is practicable, to bring all interest before it, will be done. What is impossible or impracticable it has not the rashness to attempt, but it contents itself with disposing of the equities before it, leaving, as far as it may, the rights of other persons unprejudiced."

[18] Story, Eq. Pl. §§ 77, 130–134. See, also, Hallett v. Hallett, 2 Paige (N. Y.) 15; West v. Randall, 2 Mason, 181, 190, Fed. Cas. No. 17,424; Fell v. Brown, 2 Brown, Ch. 276; Marshall v. Beverley, 5 Wheat. 313; Joy v. Wirtz, 1 Wash. C. C. 517, Fed. Cas. No. 7,554; Ward v. Arredondo, 1 Paine, 410. Fed. Cas. No. 17,148; Beaumont v. Meredith, 3 Ves. & B. 180. And where persons who are necessary parties refuse to appear, and the court has no power to reach them by its process and to compel them to appear, the bill as to them must be dismissed. Town of Virden v. Needles, 98 Ill. 366.

before the court.[19] Thus, though all the partners must ordinarily be made parties to a bill against the partnership, if one partner resides in a foreign country, where he cannot be reached, the court will usually make a decree against the partners who are within its jurisdiction.[20]

When an interested party is out of the jurisdiction of the court, and it is sought to proceed in his absence, the bill should allege that he is out of the jurisdiction; but his name should be given, and process prayed against him. If he should afterwards come within the jurisdiction, he should be brought before the court.[21] A second exception, based on the impracticability of making parties, is where the personal representative of a deceased person would be a necessary party, but it is charged in the bill that no such representative is in existence, as where the representation is in litigation. In such a case the court will proceed to a decree, if it can be done without prejudice; and, if not, then it will postpone the cause until the proper parties can be made.[22] "So, if the persons who are proper parties are unknown to the plaintiff, and the fact is so charged in the bill, and the bill seeks a discovery of those parties, for the purpose of bringing them before the court, the objection of want of parties will not be allowed to

[19] Story, Eq. Pl. § 8; Russell v. Clark, 7 Cranch, 69; Mallow v. Hinde, 12 Wheat. 193; West v. Randall, 2 Mason, 181, 190, Fed. Cas. No. 17,424; Traders' Bank v. Campbell, 14 Wall. 87; Vattier v. Hinde, 7 Pet. 252; Carey v. Hoxey, 11 Ga. 645; Towle v. Pierce, 12 Metc. (Mass.) 329; Farmers' & Mechanics' Bank v. Polk, 1 Del. Ch. 167; Equity Rule 47. See ante, p. 41.

[20] Palmer v. Stevens, 100 Mass. 461; Towle v. Pierce, 12 Metc. (Mass.) 329; Cowslad v. Cely, Prec. Ch. 83; Darwent v. Walton, 2 Atk. 510. Cf. Vose v. Philbrook, 3 Story, 335, Fed. Cas. No. 17,010.

[21] Story, Eq. Pl. § 80; Munoz v. De Tastet, 1 Beav. 109, note: Tobin v. Walkinshaw, McAll. 26, 31, Fed. Cas. No. 14,068. But see Haddock v. Thomlinson, 2 Sim. & S. 219.

[22] Plunket v. Penson, 2 Atk. 51; Carey v. Hoxey, 11 Ga. 652; Vann v. Hargett, 2 Dev. & B. Eq. (N. C.) 31; Atkinson v. Henshaw, 2 Ves. & B. 85; Jones v. Frost, 3 Madd. 1; D'Aranda v. Whittingham, Mos. 84. See Humphreys v. Humphreys, 3 P. Wms. 349. All persons interested in the subject of a suit in equity must, as a general rule, be made parties; and it is not enough to excuse the omission of a party or his representative that he is dead, and that no representative has been appointed. Martin v. McBryde, 3 Ired. Eq. (N. C.) 531.

prevail, for the reason already assigned, and for the additional reason that it is one of the very objects of the bill to obtain the information which will enable the plaintiff to cure the defect, and in no other way can it be cured." [23] So, where the parties are very numerous, as has been seen, the court will not insist on all being made parties, but will dispense with some of them, and proceed to a decree, if it can be done without prejudice to those not actually before the court.[24]

PARTIES COMPLAINANT—CAPACITY TO SUE.

15. In general, all persons not incapacitated by some special disability may sue in equity in their own right.

16. Incapacity to sue in equity may be either

(a) Absolute, which wholly disables the party while it continues to exist, as in the case of an alien enemy; or

(b) Partial, which disables the person from suing without the aid of another, as in the case of

(1) Infants.

(2) Persons non compotes mentis.

(3) Married women, unless enabled by statute.

[23] Story, Eq. Pl. § 92; Bowyer v. Covert, 1 Vern. 95; Heath v. Percival, 1 P. Wms. 682, 684; Fenn v. Craig, 3 Younge & C. 216, 224.

[24] Story, Eq. Pl. § 94; Cockburn v. Thompson, 16 Ves. 321; West v. Randall, 2 Mason, 181, 192–196, Fed. Cas. No. 17,424; Wendell's Ex'rs v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 344, 349; Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; Meux v. Maltby, 2 Swanst. 277; Stimson v. Lewis, 36 Vt. 91; Mandeville v. Riggs, 2 Pet. 482; Fenn v. Craig, 3 Younge & C. 216, 224, and note; Smith v. Swormstedt, 16 How. 288; Jewett v. Tucker, 139 Mass. 566, 2 N. E. 680. See U. S. Equity Rule 48. The bill should allege that the parties are too numerous to be joined. Whitney v. Mayo, 15 Ill. 251; Wallworth v. Holt, 4 Mylne & C. 619, 635. Cases where one or more are permitted to sue or defend on behalf of the others are illustrations of this principle of exception. See ante, p. 28. See, also, Strong v. Waterman, 11 Paige (N. Y.) 607; Bromley v. Smith, 1 Sim. 8; Bouton v. City of Brooklyn, 15 Barb. (N. Y.) 375; People v. Sturtevant, 9 N. Y. 263; Newcomb v. Horton, 18 Wis. 566.

Complainants in General.

The general rule above given includes in its scope all sorts and conditions of persons not subject to some special disability, and the term "persons" refers, not only to natural persons of full age and sound mind, but to artificial persons, as bodies politic and corporate.[1] Thus, a corporation may sue in equity, whether municipal or private,[2] and a state may sue in any of the federal courts.[3] So foreign sovereigns acknowledged by our government, and not at war with this country, may sue in our courts, when they have a just right;[4] the constitution of the United States expressly giving jurisdiction to the federal courts where foreign states are parties.[5] Foreign corporations, also, whether private or municipal, and when not belonging to a public enemy, may sue in equity, and it has been usual to maintain suits by them upon principles of international justice.[6] Foreign executors and administrators, such as those appointed in another state than that where the suit is brought, cannot, in general, sue without taking out ancillary letters of administration unless title is vested in them as trustees by devise.[7] The United States may also sue in equity, though, as

§§ 15–16. [1] Story, Eq. Pl. § 50 et seq.; Lubé, Eq. p. 34.

[2] Story, Eq. Pl. §§ 50, 55; Board of Domestic Missions of German Reformed Church v. Von Puechelstein, 27 N. J. Eq. 30; Robinson v. Smith, 3 Paige (N. Y.) 222; Mauney v. Manufacturing Co., 4 Ired. Eq. (N. C.) 195; Inhabitants of Montville v. Haughton, 7 Conn. 543; Dewing v. Perdicaries, 96 U. S. 196.

[3] Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437.

[4] King of Spain v. Oliver, 2 Wash. C. C. 429, Fed. Cas. No. 7,814; King of Spain v. Machado, 4 Russ. 225, 238; Hullet v. King of Spain, 2 Bligh (N. S.) 31, 51; City of Birne v. Bank of England, 9 Ves. 347; Dolder v. Bank, 10 Ves. 352. It is a condition precedent, however, that such foreign sovereign or state shall have been recognized by our government. See Gelston v. Hoyt, 3 Wheat. 246, 324.

[5] Const. art. 3, § 2; King of Spain v. Oliver, 2 Wash. C. C. 429, Fed. Cas. No. 7,814. The Cherokee Nation of Indians was held not to be within the rule as to "foreign states," as the term is used in the constitution, and therefore could not maintain an action in the courts of the United States. See Cherokee Nation v. State, 5 Pet. 1.

[6] South Carolina Bank v. Case, 8 Barn. & C. 427; Henriques v. Dutch Co., 2 Ld. Raym. 1532; Society for Propagation of Gospel v. Town of New Haven, 8 Wheat. 464; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Story, Eq. Pl. § 55.

[7] Crosw. Ex'rs & Adm'rs, § 564.

we shall hereafter see, it cannot be made a defendant unless the exemption be waived by statute.[8]

Persons under Absolute Disability.

It has been mentioned above that the incapacity to sue in equity is of two kinds,—absolute and partial. The only instance of the former is that of an alien enemy,—that is, a subject of a country at war with the United States, who is absolutely debarred from the privilege of suing in our courts so long as he continues in that character,[9] though it seems that, if any country permits an alien enemy to be sued at law in its courts, he should be allowed every effectual means of establishing his defense, even to the extent of bringing a bill in equity for discovery.[10] This appears to be the only exception to the rule. No such rule, however, applies to an alien friend, whose rights are fully recognized and protected so far as he has a right, under our laws, to the subject-matter of the suit. Such a person comes into this country under the express or implied agreement of our government to protect him in his person or rights so long as he acknowledges its authority and bears towards it a temporary allegiance; and he remains under the same protection, and continues, impliedly at least, a subject of this country, should a war break out between it and his own.[11] With such protection extended, his rights would be merely nominal, in default of the privilege of enforcing them in our courts.

Persons under Partial Disability.

Partial incapacity to sue, as has been stated, only disables the party from suing alone; the right being still effective, and en-

[8] Post, p. 54; U. S. v. Clarke, 8 Pet. 436.

[9] Coop. Eq. Pl. 27; Seymour v. Bailey, 66 Ill. 288; Orr v. Hodgson, 4 Wheat. 453, 465. See, also, Daubigny v. Davallon, 2 Anstr. 467; Pisani v. Lawson, 6 Bing. N. C. 90. The effect of the disability is to suspend the commencement of any suit during the war, or, if already commenced, to stay further proceedings until the return of peace. See Ex parte Boussmaker, 13 Ves. 71; Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508. See, also, Masterson v. Howard, 18 Wall. 99.

[10] See Albretcht v. Sussmann, 2 Ves. & B. 323, and the case of Daubigny v. Davallon, 2 Anstr. 462, there cited.

[11] If, by the laws of any state, an alien cannot hold land, he is there incapable of bringing a suit for its recovery, or on any demand of a mixed nature, partly real and partly personal. See Co. Litt. 129b; Coop. Eq. Pl. 25.

forced through the medium of another person, who brings the suit on behalf of the one thus incapacitated. Of this class are infants, who are disabled from bringing suit by reason of their want of discretion, and their inability to bind themselves and become responsible for costs.[12] A suit may be brought on behalf of an infant by any person who will undertake it as his next friend, though always subject to the approval and control of the court.[13] Whether a general guardian may thus act for the infant ward in chancery seems doubtful, and the rule in the federal courts, that "all infants and other persons so incapable may sue by their guardians, if any, or by their next friends, subject to such orders as the court may direct"[14] for their protection, has not yet been construed, so far as it apparently changed the former practice that the suit must be brought by the next friend.

Persons of unsound mind, as idiots and lunatics, are also classed with those partially incapacitated, and suit on their behalf must be brought by their committee or guardian, or whatever representative is designated by statute; this care of such persons being generally provided for by local laws.[15]

Married women are the third class under partial disability, and the general rule, both in law and equity, has been that the husband must join with the wife in all actions, unless he had deserted her, or was civilly dead or without the realm, when she could sue alone; and except as to her separate property, when she could sue by her next friend, who was chosen by herself, the husband being then made a party defendant.[16] A further exception has been made in

[12] Story, Eq. Pl. (10th Ed.) § 57; Calv. Parties, p. 315, c. 11, § 29; Bowie v. Minter, 2 Ala. 406, 410.

[13] See Morgan v. Thorne, 7 Mees. & W. 400, where the rights and duties of a prochein ami are discussed at length.

[14] Equity Rule 87.

[15] Story, Eq. Pl. (10th Ed.) §§ 64–66; Calv. Parties, p. 316, c. 11, § 29. See, generally, Norcom v. Rogers, 16 N. J. Eq. 484; Dorsheimer v. Roorback, 18 N. J. Eq. 438; Ortley v. Messere, 7 Johns. Ch. (N. Y.) 139.

[16] See Story, Eq. Pl. (10th Ed.) § 61; Countess of Portland v. Prodgers, 2 Vern. 104; Newsome v. Bowyer, 3 P. Wms. 37; Wake v. Parker, 2 Keen, 59, 70; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196, 210; Wilson v. Wilson, 6 Ired. Eq. (N. C.) 236; Spring v. Sandford, 7 Paige (N. Y.) 551; Bowers v. Smith, 10 Paige (N. Y.) 193; Roberts v. Evans, 7 Ch. Div. 830; Forbes v. Tuckerman, 115 Mass. 115.

cases where the wife complains of, and seeks relief against, the husband, when she must use the name of some other person, though, where the husband is not complained of, he is the proper person to unite with her in the suit.[17] This is the rule in the federal courts,[18] but the practice is one resting in the discretion of the court; and it would seem that, as in most, if not all, the states, a married woman has now substantially the same powers as if single, the right to sue alone in equity should also be included, especially if she is a citizen of the state in whose courts she seeks relief. In cases where another person sues as the next friend of a married woman, it must always be with her consent.[19]

SAME—REAL PARTY IN INTEREST.

17. Suits in equity must be brought by the real party in interest.

As has been seen, the touchstone of interest determines who are necessary or proper parties to suits in equity. It follows that such suits should be brought by the real party in interest, not in the name of one person for the use of another.[1] In this respect there

[17] Story, Eq. Pl. (10th Ed.) § 61; Lady Elibank v. Montolieu, 5 Ves. 737; Pennington v. Alvin, 1 Sim. & S. 264. Without the aid of a statute, a wife may sue her husband in equity in respect to her separate property. Markham v. Markham, 4 Mich. 305.

[18] See Bein v. Heath, 6 How. 228.

[19] Lubé, Eq. Pl. § 13; Mitf. Eq. Pl. 28; Gambee v. Atlee, 2 De Gex & S. 745; Fulton v. Rosevelt, 1 Paige (N. Y.) 178.

§ 17. [1] Elder v. Jones, 85 Ill. 384. Followed by Smith v. Brittenham, 109 Ill. 540. Cf. Frye v. Bank of Illinois, 5 Gilman (Ill.) 332; Moore v. School Trustees, 19 Ill. 83. Suit must be brought by real party in interest. Kitchins v. Harrall, 54 Miss. 474. One who is not the beneficial owner of a note cannot bring suit in equity in his own name to enforce its payment. Wolverton v. George H. Taylor & Co., 157 Ill. 485, 42 N. E. 49. It is a well-recognized rule that in equity the party having the beneficial interest in the subject-matter of the suit must sue in his own name. Smith v. Brittenham, 109 Ill. 540, 1 Daniell, Ch. Prac. §§ 192, 197, note 7; Rogers v. Insurance Co., 6 Paige (N. Y.) 585; Field v. Maghee, 5 Paige (N. Y.) 539; Chisholm v. McDonald, 30 Ill. App. 176, 180; Oakey v. Bend, 3 Edw. Ch. (N. Y.) 482. Where a suit is authorized, it is no concern of the defendant that it is really in the interest of a third party,

is a sharp distinction from actions at law, which must be brought in the name of the person having the legal title.

SAME—JOINDER.

18. All the parties complainant must have either
(a) A joint interest, or
(b) A common interest.

19. PERSONS UNITED IN INTEREST—All persons who are united in interest must join as complainants,[1] except

EXCEPTION—If the consent of any one who should have been joined as complainant cannot be obtained, he may be made a defendant, the reason thereof being stated in the bill.

The rule above given, that parties who are united in interest—that is, those who have the same or a joint interest—must be joined as complainants, is a rule in all courts. The rule is mandatory, and at common law, if one or more of those who have joint rights should refuse their consent to be joined as complainants, there is no remedy.[2] But in equity there is a remedy. The unwilling parties can be made defendants, the reason thereof being stated in the bill; and the court, having all the parties before it, will then proceed

who has equitable rights which he expects to have recognized in case it is successful. Tong v. Marvin, 26 Mich. 35.

§§ 18–19. [1] This rule has been enacted in all the modern practice codes, which have assimilated so many of the rules of equity pleading, and its effect has been thus stated: "We apprehend this union of interest refers to such cases as joint tenants, co-trustees, partners, joint owners, or joint contractors simply, where in fact a separate judgment in favor of one of them would not be proper in the case stated in the complaint. * * * The test of the unity of interest intended * * * is that joint connection with or relation to the subject-matter, which by the established practice of the common-law courts will preclude a separate action." Jones v. Felch, 3 Bosw. (N. Y.) 63. The only cases where individuals can sue on behalf of themselves and others are where the interests, though numerous, are all separate, individual, and not joint or public, interests, identical in character and origin, but all private and independent rights growing out of the same transaction or fraud. Miller v. Grandy, 13 Mich. 540.

[2] "Nor, at common law, can parties having only an interest in the subject of the action and in the remedy be united as plaintiffs, unless that interest be joint." Bliss. Code Pl. § 61.

to a decree, and do justice to all concerned.[3] At common law a judgment had to be either in favor of all the parties on one side, or against all, but this rule does not obtain in equity practice. A decree may be given for or against one or more of several complainants, and for or against one or more of several defendants; and by the decree the court may determine the ultimate rights of the parties on either side, as between themselves, and grant to the defendant any affirmative relief to which he is entitled.[4] Where a promise or covenant is made with two or more persons, the presumption is that they are united in interest, and must join in the action. There is no presumption that their interest is several, unless words separating their interest are used. The rights of the promisees or covenantees are always either joint or several. They are never joint and several. Liabilities may be joint and several.[5]

Bills to foreclose mortgages furnish an apt illustration of the rule requiring all persons jointly interested to be brought before the court. Thus, a person entitled to a part only of the mortgage money cannot file a bill to foreclose the mortgage as to his own part of the money, but all the other persons in interest must be made parties, and the mortgage foreclosed as to all.[6] Joint creditors cannot, by dividing their claim, acquire separate rights of ac-

[3] Smith v. Sackett, 5 Gilman (Ill.) 534.

[4] It is no ground for the dismissal of a suit, when all the parties are before the court, that the parties are wrongly placed as plaintiff or defendant. West v. Bank, 19 Vt. 403. See, also, Sapp v. Phelps, 92 Ill. 588, 595. The improper or unnecessary joinder of a party plaintiff will not defeat a cause in equity. Brown v. Lawton, 87 Me. 83, 32 Atl. 733. When the complainant in a bill in equity has joined with him, as co-complainants, other parties who have a similarity, but no community, of interest with him, and whose joinder with him is not necessary, and as between whom and some of the defendants the court cannot take jurisdiction, because of their citizenship, the complainant should be permitted to amend his bill by striking out the names of such parties as complainants, and making them defendants to the bill, so as to remove the impediment to the jurisdiction. Insurance Co. of North America v. Svendsen, 74 Fed. 346.

[5] Bliss, Code Pl. (3d Ed.) § 61, note. See Slingsby's Case, 5 Coke, 18b; Hinkle v. Davenport, 38 Iowa, 355; Gould v. Gould, 6 Wend. (N. Y.) 263. As to when a right is joint or several, see Bliss, Code Pl. § 63.

[6] Story, Eq. Pl. § 201; Lowe v. Morgan, 1 Brown, Ch. 368; Palmer v. Carlisle, 1 Sim. & S. 423; Wing v. Davis, 7 Greenl. (Me.) 31.

tion against the debtor. Causes of action cannot be split, either at law or in equity.[7] This rule is, of course, subject to the general exceptions to the rule as to necessary parties already explained.

20. PERSONS HAVING A COMMON INTEREST—All persons having an interest in the subject of the suit, and in obtaining the relief demanded, may join as plaintiffs.

Generally, where persons have a common interest in the subject-matter of the bill, and a right to ask for the same remedy against the same defendants, they may properly be joined as complainants.[1]

[7] Courts of equity will not encourage the splitting of causes of action, and needless litigation. German American Seminary v. Kiefer, 43 Mich. 105, 4 N. W. 636; Vincent v. Moore, 51 Mich. 618, 17 N. W. 81. But a complainant may, if he chooses, make distinct controversies on the same matter the subjects of separate suits. As, for example, the validity of a mortgage, and the regularity of a statutory foreclosure of it. Bonker v. Charlesworth, 33 Mich. 81. But one of several joint creditors who has released the debtor need not be joined in a suit by the other creditors. Canal Co. v. Gordon, 6 Wall. 561; Upjohn v. Ewing, 2 Ohio St. 13; Tyler v. Water Co., 14 Cal. 212.

§ 20. [1] Cadigan v. Brown, 120 Mass. 494; Pettibone v. Hamilton, 40 Wis. 402, 417; Churchill v. Lauer, 84 Cal. 233, 24 Pac. 107. See Loomis v. Brown, 16 Barb. (N. Y.) 325. Joint suits will not lie in a case in which there is no common interest on one side or the other. Brunner v. Bay City, 46 Mich. 236, 9 N. W. 263. Where the interests of complainants are several, and not joint, they must be severally enforced. Walsh v. Varney, 38 Mich. 73. Co-sureties who have paid the whole of a judgment rendered against all the sureties may jointly file a bill in equity to effect the removal of obstacles fraudulently interposed to prevent their obtaining contribution from the other sureties. Smith v. Rumsey, 33 Mich. 183. Separate taxpayers may join as complainants in a bill to enjoin the collection of an invalid tax upon lands. Scofield v. City of Lansing, 17 Mich. 437; Bristol v. Johnson, 34 Mich. 123. Several complainants cannot join in a bill to restrain the collection of a personal tax assessed against them separately in respect to the business in which each is individually engaged. Youngblood v. Sexton, 32 Mich. 406. If parties who complain of tax proceedings are not affected in all things alike, they must sue severally, or not at all, and each must have a grievance that equity can redress. Barker v. Vernon Tp., 63 Mich. 516, 30 N. W. 175. Taxpayers may join in a bill to restrain a municipal corporation from carrying out an illegal contract that would

There is a distinction between the rule requiring persons united in interest to be joined, and the one just given, as the latter does not contemplate a joint interest, nor is the union made imperative. In the case where it has been sanctioned, the interest is called a "common" one,—that is, certain persons are interested in that concerning which the wrong has been done, and will be all benefited by the relief which is sought; they have a common interest, and may join in seeking the relief. Thus, the owners of distinct parcels of property may be interested in being relieved from a nuisance; different creditors may be interested in setting aside a fraudulent conveyance; and tenants in common, though holding in severalty, may be interested in preventing a trespass. In either case they may unite in a bill in equity.[2] The technical common-law rule confined the union to those having a joint interest. Thus, if the waters of a mill stream are diverted, or if the outlet of a reservoir be so managed as to prevent its proper use by the mills below, their several owners may unite in a bill for an injunction,[3]

impose additional taxation upon them. Putnam v. Grand Rapids, 58 Mich. 416, 25 N. W. 330. Thus, where a tax is levied without authority, several property owners having a common interest may join in a bill to restrain collection. Mt. Carbon Coal & Railroad Co. v. Blanchard, 54 Ill. 240. Where there is an identity of interest in the question involved and in the relief sought, and the separate injury to each is caused by the same wrongful act, there is a proper joinder of parties. Maywood Co. v. Village of Maywood, 17 Ill. App. 253, affirmed 118 Ill. 61, 6 N. E. 866. Cf. Hickling v. Wilson, 104 Ill. 54. Complainants who are injured in the same way by illegal and fraudulent proceedings to extend a drain may unite in a bill to enjoin them. Zabel v. Harshman, 68 Mich. 270, 36 N. W. 71. An objection to a misjoinder of parties complainant is properly taken by demurrer. Stookey v. Carter, 92 Ill. 129.

[2] Bliss, Code Pl. § 73; Edmeston v. Lyde, 1 Paige (N. Y.) 637; Brownson v. Gifford, 8 How. Prac. (N. Y.) 389. Where all parties seek the same relief against the same injury on the same grounds they may properly join. The bill will not be multifarious as to parties. Harward v. Drainage Co., 51 Ill. 130. Followed by Harward v. Illinois, Id. 138; Mt. Carbon Coal & Railroad Co. v. Blanchard, 54 Ill. 240; Hickey v. Railroad Co., 6 Ill. App. 172.

[3] Belknap v. Trimble, 3 Paige (N. Y.) 577. Contra, Schultz v. Winter, 7 Nev. 130. Several owners of mills may maintain one bill in equity to restrain a stranger from letting off water from a reservoir which they have jointly erected for the purpose of supplying their mills in the dry season, without first establishing their title at law. Ballou v. Inhabitants of Hopkinton (1855) 4 Gray (Mass.) 324. Parties owning lands in severalty may join in a bill to-

or they may unite against another several owner to restrain him from using more water than he is entitled to;[4] and the owners of distinct city lots and improvements may unite in suppressing a nuisance.[5] So, distinct judgment creditors are allowed to join in a bill to set aside conveyances made to defraud creditors.[6] In these cases there is a common interest in the water and in stopping its diversion, in removing or suppressing the subject-matter of the nuisance, and in appropriating the property fraudulently conveyed.

This permissive union of parties is limited by the terms of the rule. All who would unite must be interested in the subject of the action and in the relief. It may not be possible to define with absolute precision the phrase "subject of the action," but we may say, in general, that it is the matter or thing concerning which the action is brought; and, though one may be interested in that matter, unless he is also interested in the relief which is sought by another, he is not permitted to unite with him.[7] Thus, to take the cases which have been cited, two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the downflow of the water, and may unite to restrain or abate it as a nuisance. The abatement or prevention of the nuisance involves but a single judgment, in obtaining which all the mill owners are interested, and by which they are all benefited.

restrain defendant from flooding such land by an excessive dam. Turner v. Hart (July 11, 1888) 71 Mich. 128, 38 N. W. 890.

[4] Emery v. Erskine, 66 Barb. (N. Y.) 9.

[5] Peck v. Elder, 3 Sandf. (N. Y.) 126. See Tate v. Railroad Co., 10 Ind. 174.

[6] Brinkerhoff v. Brown, 6 Johns. Ch. (N. Y.) 139; Dix v. Briggs, 9 Paige (N. Y.) 595; Wall v. Fairley, 73 N. C. 464; Gates v. Boomer, 17 Wis. 455.

[7] Bliss, Code Pl. § 76. See also, post p. 337, "Multifariousness." Different mortgagees, holding mortgages given at the same time and securing several obligations, are tenants in common, and may join in one suit to secure their rights. Cochran v. Goodell, 131 Mass. 464.

PARTIES DEFENDANT—WHO MAY BE SUED.

21. In general, all persons whatsoever, whether natural or artificial, may be sued in equity, unless exempt by law, or through some cause placing them beyond the jurisdiction of the court in which the action is to be instituted.

Defendants in General.

The persons against whom a bill in equity may be exhibited include all persons, whether natural or artificial, not exempt by law, or through some cause placing them beyond the jurisdiction of our courts. The liability thus extends to bodies politic and corporate;[1] to all persons not under disability; and generally to those under either partial or absolute disability,—the incapacity under which they rest, though affecting their right to sue, leaving them still liable to be sued.[2] It may be said here, however, that no person should be made a party defendant, and no one, though named as such, will be so regarded, against whom no decree can be rendered.[3] The United States, moreover, is exempt from being sued

§ 21. [1] A corporation is properly a defendant in suits involving the corporate rights and liabilities. See the statutes of the different states. Lyman v. Bonney, 101 Mass. 562. Who should be defendants in a suit by a stockholder of a voluntary association for a settlement of the affairs of the company, see Evans v. Stokes, 1 Keene, Ch. 24; Richardson v. Hastings, 11 Beav. 17. As to defendants where trustees hold the corporate property, see McKinley v. Irvine, 13 Ala. 681. See, also, Samis v. King, 40 Conn. 298; Allen v. Turner, 11 Gray (Mass.) 436; Inhabitants of Deerfield v. Nims, 110 Mass. 115.

[2] Story, Eq. Pl. § 71; U. S. Equity Rule 87. See Parker v. Lincoln, 12 Mass. 16; Bank of United States v. Ritchie, 8 Pet. 128, 144; Westcomb v. Westcomb, 1 Dickens, 233; Yount v. Turnpaugh, 33 Ind. 46, 49; Search v. Search, 26 N. J. Eq. 110; Sturges v. Longworth, 1 Ohio St. 544; New v. New, 6 Paige (N. Y.) 237.

[3] Mayor & Citizens of London v. Levy, 8 Ves. 398; Van Reimsdyk v. Kane, 1 Gall. 371, Fed. Cas. No. 16,871. But an agent or officer of a corporation may be made a party to a bill of discovery against the latter. See Wych v. Meal, 3 P. Wms. 310; Many v. Iron Co., 9 Paige (N. Y.) 188. Complainant in a bill cannot properly appear as a defendant in the same suit. Henderson v. Sherman, 47 Mich. 267, 11 N. W. 153.

in its own courts,[4] though such exemption may be waived by an express statute; and it appears also that the commencement of a suit by the federal government impliedly waives this exemption, by allowing the defendant to plead a set-off, and the same waiver takes place in proceedings in rem, by allowing a consideration of all claims to the property in question.[5] A second exception to the rule above mentioned, preventing one state from being made a party defendant by the citizens of another, arises under the eleventh amendment to the federal constitution, which prohibits such action.[6] Another exists in the case of foreign states or sovereigns;[7] and a fourth, in that of receivers appointed by state courts, who, as officers of the court appointing them, cannot be sued, unless upon leave of such courts first obtained. Still another exception is recognized in the case of foreign executors and administrators, who cannot be made parties defendant unless they have assets within the jurisdiction of the court in which the bill in equity is filed, as without the latter condition the court can exercise no power affecting them, and it would therefore be useless to make them parties defendant.[8]

SAME—JOINDER.

22. Any person may be made a defendant who has or claims an interest in the controversy adverse to the complainant, or who is a necessary party to a complete determination or settlement of the question involved therein.

23. Persons who are jointly liable must all be joined as defendants.

[4] Carr v. U. S., 98 U. S. 433.

[5] The Siren, 7 Wall. (U. S.) 152. And see Fifth Nat. Bank v. Long, 7 Biss. 502, Fed. Cas. No. 4,780; Briggs v. The Light Boats, 11 Allen (Mass.) 157.

[6] As to this amendment, see Cohens v. Virginia, 6 Wheat. (U. S.) 405. And as to when a state is within the rule, see Osborn v. Bank of U. S., 9 Wheat. (U. S.) 738; New York v. Connecticut, 4 Dall. (U. S.) 1, 8.

[7] Story, Eq. Pl. § 69a.

[8] Crosw. Ex'rs & Adm'rs, p. 481.

24. Persons who ordinarily should join as complainants, but who refuse their consent, may be joined as defendants.

The general rule as to defendants is that any person may be made a defendant who has or claims an interest in the controversy adverse to the complainant, or who is a necessary party to a complete determination or settlement of the questions involved therein. It will be observed that this rule includes both necessary parties, without whom no effective remedy can be given, and proper parties, who may be omitted under circumstances already considered.

Persons who are united in interest must be joined as defendants.[1] It will be observed that this rule as to joinder applies to parties upon either side whose interests are the same. "The old common-law significance of the term 'joint' should be borne in mind. As with rights it denoted but a single, indivisible claim, so with obligations all the obligors constituted, as it were, one person, owing a single debt, and no one of them owed any part of it. Hence the necessity of bringing all before the court, and no others. There was no claim except as against all, and if a less number, or if others, were charged, the contract sued on was not the one made."[2] "In cases of this sort, the general rule is that all the joint owners, joint contractors, and other persons having a community of interest in duties, claims, or liabilities, who may be affected by the decree, should be made parties. The rule, however,

§§ 22-24. [1] Story, Eq. Pl. § 169; Dunham v. Ramsey, 37 N. J. Eq. 388. Partners must be all joined. Bank v. Railroad Co., 11 Wall. 624, 630; Fuller v. Benjamin, 23 Me. 255; Ex parte Henderson, 4 Ves. 164; Story, Eq. Pl. §§ 78, 167, 178. But see Hamersley v. Lambert, 2 Johns. Ch. 508; Milligan v. Milledge, 3 Cranch, 220; Darwent v. Walton, 2 Atk. 510. Equity rule 51, copied from the thirty-second order in chancery of August, 1841, provides that "in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable." This rule does not apply when the demand is merely joint, and not joint and several. Pierson v. Robinson, 3 Swanst. 139, note.

[2] Bliss, Code Pl. § 92.

does not apply to cases of joint and several contracts; for in the latter cases, according to the present practice, the bill may be brought against one or more of the persons severally liable. But in other cases it still prevails." [3] Thus, one joint tenant cannot ordinarily sue or be sued without joining the other joint tenants.[4] So, tenants in common must all sue and be sued in cases touching their common rights and interests.[5] Many joint obligations have been made joint and several by statute.

There is an important modification of the rule as to joint obligors made by courts of equity which was unknown in the courts of common law. This modification relates to survivorship. At common law, upon the death of any one under joint obligations, leaving a surviving co-obligor, his personal representatives could not be prosecuted, and the action could be prosecuted only against such survivor or survivors. The old rule of law was that death discharged the obligation, charging it upon the survivor or survivors only. This rule was very inequitable, both to the survivors and to the creditor. It has been avoided in equity, and the rule established that the personal representatives of a deceased co-obligor can be charged in equity, although the obligation, by its terms, be joint, and they can be joined as defendants with the survivor.[6]

Multifariousness or Misjoinder by an Improper Union of Defendants.

In equity pleading, multifariousness applies to an improper joinder of distinct and independent matters, and often involves the improper union of defendants, inasmuch as one defendant, or class of defendants, may have an interest in one of the matters improperly united, and not in the others, and hence should not be called on to answer in respect to them.[7]

[3] Story, Eq. Pl. § 159; Conolly v. Wells, 33 Fed. 205; Howth v. Owens, 29 Fed. 722; De Puy v. Strong, 37 N. Y. 372. See U. S. Equity Rule 51.

[4] Coop. Eq. Pl. 35; Story, Eq. Pl. § 159; Weston v. Keighley, Cas. t. Finch, 82.

[5] Shepard v. Railroad Co., 117 N. Y. 442, 23 N. E. 30; Brookes v. Burt, 1 Beav. 106; Fallowes v. Williamson, 11 Ves. 306.

[6] Bliss, Code Pl. § 105. The obligations of trustees and partners are joint in fact, both at law and in equity. Bliss, Code Pl. § 106.

[7] Bliss, Code Pl. § 110. See, also, post, p. 337, "Rule against Multifariousness." The making of an improper person a defendant does not render the bill demurrable as to the other parties. Mitchener v. Robins, 73 Miss. 383,

Who may be United without a Joint Interest.

Those may be united as defendants, although they may have no joint interest, between whom there is a common point of interest. "Where several persons, although unconnected with each other, are made defendants, a demurrer will not lie, if they have a common interest centering in the point in issue in the cause." [8] As in a creditors' bill, when the debtor had conveyed lands in fraud of creditors, and the title to different parcels had passed to different persons, they may all be joined as defendants in one action,

19 South. 103. A bill seeking to hold several defendants for separate individual frauds is demurrable for misjoinder. Woodruff v. Young, 43 Mich. 548, 6 N. W. 85. A proper party defendant cannot be heard to object that another is improperly joined with him. The joinder as ground of demurrer is for the party improperly joined. Peoria, D. & E. Ry. Co. v. Pixley, 15 Ill. App. 283. It is a good ground of demurrer to the whole bill that one of the complainants has no interest in the suit, and has improperly joined with others in filing the bill; but there is no such rule in regard to defendants. Barstow v. Smith, Walk. (Mich.) 394.

[8] Fellows v. Fellows, 4 Cow. (N. Y.) 682, 700. See, also, Varick v. Smith, 5 Paige (N. Y.) 137; Hamlin v. Wright, 23 Wis. 491. A bill is not multifarious on account of the joinder of parties defendant where the object of the suit is single, and there is one general point in issue, rendering the interest common to all the defendants. Brown v. Solary, 37 Fla. 102, 19 South. 161. A petition to set aside conveyances made through the combined fraud of the several defendants, and praying for appropriate relief as to each, was not demurrable for misjoinder of parties defendant, though each defendant had a separate interest in the result of the fraud. Bowden v. Achor, 95 Ga. 243, 22 S. E. 254. A bill is not multifarious when the parties have a common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests. Butler v. Spann, 27 Miss. 234. Thus, where the complainants claim under one title and bring their suit against various defendants, who claim the same estate under distinct and separate sales of different parcels thereof made to them separately, when the gravamen of fraud or wrong in the sale is the same, and equally applies to all, the bill is not multifarious (citing Delafield v. Anderson, 7 Smedes. & M. 630). Butler v. Spann, 27 Miss. 234. S. P., Forniquet v. Forstall, 34 Miss. 87 (citing Butler v. Spann, supra; Nevitt v. Gillespie, 1 How. [Miss.] 108; Gaines v. Chew, 2 How. 619). Where a contract of suretyship for payment of rent recited that each of the two tenants is to pay half the rent, and that each of the two sureties is to be liable for only one tenant's portion of the rent, an action cannot be maintained against the sureties jointly, as Code Civ. Proc. § 454, permits joinder of several defendants only when they are liable under the same instrument for

for they all have an interest in respect to the fraud.[9] So, in an action by a principal against his agent, who, with the complainant's money, had purchased property, and, without consideration, had conveyed it, part to one co-defendant and part to another, the complaint was held to be not multifarious.[10] A widow, in a petition to set aside gifts made by the husband, in view of death, in order to defraud her of her dower, may make all his grantees parties, although their interests are distinct;[11] and a distributee of an estate, in pursuit of a fund which has come into the hands of a trustee under a will, should make parties of the other distributees and residuary legatees.[12]

In a proceeding to set aside sales of city lots made by an administrator, and for an accounting, the heirs should join as defendants the several purchasers of the lots.[13] A bill for foreclosure which makes parties of sundry persons for the purpose of cutting off their equities is not for that reason multifarious.[14] In the supreme court of the United States, the right is shown to join all who claim real or personal estate under one title, although by distinct and separate sales, when each sale was not only wrongful, but involved the consideration of the same question, to wit, the authority under which they were made.[15] But no one will be made a defendant whose presence or absence will not affect the judgment as between him and the complainant.[16]

the same demand. Southmayd v. Jackson (City Ct. N. Y.) 37 N. Y. Supp. 201, 15 Misc. Rep. 476.

[9] Winslow v. Dousman, 18 Wis. 456; North v. Bradway, 9 Minn. 183 (Gil. 169); Donovan v. Dunning, 69 Mo. 436; Bobb v. Bobb, 76 Mo. 419.

[10] Blake v. Van Tilborg, 21 Wis. 672. See, also, Bassett v. Warner, 23 Wis. 673.

[11] Tucker v. Tucker, 29 Mo. 350.

[12] Dillon's Adm'r v. Bates, 39 Mo. 292; Goodwin v. Goodwin, 69 Mo. 617.

[13] Bowers v. Keesecher, 9 Iowa, 422.

[14] Greither v. Alexander, 15 Iowa, 470.

[15] Gaines v. Chew, 2 How. 619.

[16] State v. Wright, 50 Conn. 580. See, also, Young v. Young, 81 N. C. 91; De Wolf v. Manufacturing Co., 49 Conn. 282. See Bliss, Code Pl. § 110a, from which this section was largely taken.

Whether One should be Made Complainant or Defendant.

In suits where diverse interests are involved, the pleader may not see at once whether a party should be united as a complainant, or be treated as an antagonist. The rule, as already given, is that those who are united in interest must be joined as complainants or defendants, except that, where one is unwilling to join as complainant, he may be made a defendant. Where there are more than one having the same interest, and who are necessary parties, one of them cannot bring an action making the others defendants, unless they refuse to unite as plaintiffs; nor can those having adverse interests unite as complainants.[17] To illustrate: While different mortgagees cannot unite in a bill to foreclose, inasmuch as they are not united in interest, if a single mortgage, or the obligations secured by it, are assigned to more than one, they must unite, for their interest is the same. In the first case the interests of the different mortgagees are distinct from each other, and perhaps adverse; in the last they depend upon the same deed, and that which affects its validity as to one would affect it as to all. The adjustment of their rights as between themselves is provided for in the decree. So, in a petition for the specific performance of a real contract, where the vendee has sold the property embraced in the contract by parcels, and to different persons, the purchasers of all the parcels are united in interest as assignees, and should unite in the petition.

The difference between complainants and defendants, in respect to their relations, is this: While persons, to join as complainants, must have a joint interest or a common interest, this is not required of defendants; for all whose interests are adverse to that of the complainants must be made defendants, and all who have an interest in the subject of the action may be made defendants.[18]

[17] Bliss, Code Pl. § 111a. [18] Id.

CHAPTER III.

PROCEEDINGS IN AN EQUITABLE SUIT.

25. In General.
26. Bill of Complaint.
27–29. Process for Appearance.
30–34. Appearance.
35–40. Proceedings on Default.
41–42. Defense.
43–44. Dilatory Defenses.
45–46. Peremptory, or Permanent, Defenses.
47–48. Formal Modes of Defense.
49. The Disclaimer.
50–51. The Demurrer.
52–53. The Plea.
54–55. The Answer.
56–57. The Replication.
58. Interlocutory Proceedings.
59. Amendment.
60. Receivers.
61. Payment of Money into Court.
62. Reference to a Master.
63. Feigned Issues.
64–67. Injunctions.
68. Preliminary Injunctions.
69. Perpetual Injunctions.
70. Production of Documents.
71. Intervention.
72. Ne Exeat.
73–74. The Evidence.
75. The Answer as Evidence.
76–77. Demurrer to Interrogatories.
78. The Hearing.
79–82. The Decree.
83–84. Correction or Reversal of Decrees.
85. Interlocutory Decrees—Motion or Rehearing.
86. Rehearing.
87. Bills of Review.
88. Bills to Impeach Decrees.
89. Appeals.
90. Enforcement of Decrees.

91. Contempts—Process for Contempt.
92-93. Sequestration.
94. Writ of Assistance.
95-96. Execution.
97. Bills to Enforce Decrees.
98-100. Motions and Petitions.

IN GENERAL.

25. The regular successive steps in a suit in equity are:

(a) The bill of complaint.
(b) The process for appearance.
(c) The appearance.
(d) The pleadings by the defendant.
(e) The final pleading of the complainant.
(f) The evidence.
(g) The hearing.
(h) The decree.
(i) The proceedings for carrying the decree into effect.

In pursuance of the theory of this book, it will be attempted, in the present chapter, to state and explain, for the information of the student, what may or must generally occur in the conduct of an equitable suit, from its commencement to and including the rendition and enforcement of the decree, noting the successive steps in their order, and the nature and effect of each, with the addition of such rules and methods of practice as are of general application. The pleadings proper will necessarily receive but a brief notice here, as they are described and explained at length in subsequent chapters, but their relation and connection in the regular order of the proceeding will be noticed, as well as the connecting or collateral incidents or steps, —including the taking of the testimony,—which, with the pleadings, contribute towards placing the given controversy in proper form upon the record for the hearing; the hearing, at which the merits of the cause are argued by counsel and presented to the court; and, lastly, the decree, which embodies the final determination of the court upon the facts presented by the pleadings. The means available for correcting, reversing, setting aside, or enforcing the decree will also be noticed, though, where these are by an additional or an independent

bill, they will be found more fully considered hereafter, as belonging to the pleadings.[1]

BILL OF COMPLAINT.

26. The bill of complaint is the initial pleading, and the first step in the institution of the suit. It is a complete written statement, in legal form, of all facts upon which the complainant grounds his alleged right to the relief sought.

At common law, the first step in the commencement of an action was formerly by the issuance of an original writ, requiring the appearance of the defendant, and no pleading was presented until after this had issued. The course is the same at the present day, except that the precedent writ is now generally a summons, the declaration, or first pleading, following thereafter.[1] In equity procedure the bill, or "bill of complaint," as it is more properly called, is the first step in a regular suit, and also the first pleading.[2] Until it is filed, no process regularly issues; but, upon its filing, the regular process in equity, called a "subpœna," issues from the office of the clerk of the court in which the bill is filed, to compel the defendant to appear and answer its allegations. The original reason for the difference in the two modes of procedure is that the action at law is instituted to establish rights conferred by law, or to recover damages for their infraction, according to accepted and recognized methods, while the bill or petition in equity, presented at first to the sovereign or his council, and afterwards to the chancellor or the court exercising equity powers, sought relief in cases where no known legal remedy existed, and, before the aid invoked could be granted, it was necessary that the grounds for such relief should first be clearly apparent. To this end the bill or petition almost always prayed for the issuance of a subpœna to compel the defendant to appear and an-

§ 25. [1] Post, c. 4, p. 309.

§ 26. [1] See post, p. 67; Shipman, Com. Law Pl. (2d Ed.) pp. 143–145.

[2] Bart. Eq. pp. 40–43; Story, Eq. Pl. § 7. Under the equity rules, no subpœna can issue from the office of the clerk in the federal courts in any suit in equity until the bill has first been filed in the office. Eq. Rule 11.

swer, and thus the latter naturally followed the bill in the regular procedure.[3]

In early times the bill, or "petition," as it was often called, consisted of a simple statement of the facts upon which relief was prayed, often praying for relief in a very imperfect manner, and sometimes asking only for the writ of subpœna to compel the respondent to appear.[4] With the growth of the jurisdiction of chancery, however, it became an elaborate, and often an intricate, pleading, divided into nine distinct parts, and, though the tendency of later times towards simplicity and brevity in pleading has shorn it of some of its unnecessary verbiage, its form, in strict courts of equity, remains substantially the same, as will appear hereafter. As required by its nature, the bill, whether in the form of petition, bill, or information, has always been in writing; and this is also necessary by reason of the fact that in courts of equity everything must appear upon the record for the hearing, the latter being mainly an argument of the case by counsel upon the record, and not a trial as at common law.[5]

According to the English practice, the bill was originally filed in the office of the six clerks, who, under that system, had charge of the records of the courts of both chancery and common law, and, through

[3] "The first pleading on the part of the plaintiff is therefore filed, not only before the defendant has appeared, but even before process has been issued to compel his appearance. This is an anomaly in procedure, whether the system of the civil law or that of the common law be taken as the standard. According to both systems alike, the first step in a suit was the issuing and serving of process to bring the defendant into court. The next step was the appearance of the defendant in court,—a step which both systems treated as indispensable. When the defendant had appeared, and not until then, it was in order for the plaintiff to file his first pleading." Langd. Eq. Pl. § 54, note 3.

[4] Coop. Eq. Pl. 3, 4; Langd. Eq. Pl. § 55; 2 Bouv. Inst. § 4094.

[5] As will appear hereafter, the "trial" of a suit in equity is the presentment to the court of the written record, consisting of the pleadings and evidence,—the latter having been taken and reduced to writing out of court by an examiner or under a commissioner,—with the arguments of counsel. The jury trial—the great feature of most common-law actions—is not, strictly speaking, known in equity procedure, though the court may, under proper circumstances, and in the exercise of its discretion, direct feigned issues to be framed in questions of fact, and submitted to a jury. Witnesses are not generally examined in open court except to verify exhibits, or to prove the fact of their execution, or the handwriting they show.

all the changes that have occurred, it has always been and is now filed in the office of the clerk of the court to which it is presented, and, when thus filed, becomes part of the record in the suit. The rules governing the frame and structure of bills in equity will be considered hereafter.[6]

It is proper to add here, that while the bill of complaint is not the only pleading, strictly so called, of the complainant, it now embraces the only allegations of fact which he is required to make, and is the one important pleading on his side of the cause, his replication to the answer or plea of the defendant being now merely a formal reaffirmance of the bill,[7] though still a necessary formality.[8]

PROCESS FOR APPEARANCE.

27. Process for appearance, in equity, is the writ or judicial means by which a defendant is notified or commanded to appear in court and answer the allegations of the complainant's bill.

28. The regular form of process in equity is the writ of subpœna.

29. The writ of subpœna is one directed to the defendant, commanding him, under a penalty, personally to appear in court at a prescribed time, and answer the allegations of the bill. It issues in all original proceedings in equity immediately upon the filing of the bill, and, if its command is disobeyed, the appearance and answer of the defendant may be compelled by writ of attachment against his person, when a discovery from him is necessary to the rendition of a proper decree.

We have already seen that, unlike the procedure at common law, the commencement of the suit in equity is by the filing of the bill,

[6] Post, c. 4.

[7] See post, c. 9.

[8] Under the equity rules, the bill may be dismissed if the complainant neglects to file his replication as required. Rule 66.

and that no process is issued to require the appearance of the defendant until after this has taken place.[1] Formerly, under the early practice in England, no process was issued, even after the presentment or filing of the petition or bill, until the latter had first been examined to determine whether it disclosed sufficient grounds to justify the extraordinary relief sought, and this course was followed even after the jurisdiction of chancery had been fully recognized, and all bills and petitions were passed upon by the chancellor. Later, the signature of counsel to the bill, which was at first required as a guarantee that it contained no impertinent or scandalous matter, was taken as a sufficient assurance for the subpœna, and it was issued as of course, from the six clerks' office, immediately upon the filing of the bill. This is the method of procedure at the present time in most of the courts of equitable jurisdiction in this country,[2] and in the federal courts the practice is expressly affirmed by the equity rules, which provide that "no process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office." [3] In England, by the statute of 15 & 16 Vict., the former practice has been abolished, and the present method of notifying the defendant to appear and answer is by serving a copy of the bill, with proper indorsements, and a direction to the defendant to appear within a prescribed time under certain consequences. A similar practice is followed, under certain conditions, in some of the states,[4] but in most states having courts of a separate equity jurisdiction the practice is that formerly in use in England and followed in all federal courts.

The process which we are now to consider is what is called "mesne process," as distinguished from "final process," such as the writ of

§§ 27-29. [1] Ante, p. 63.

[2] As to the practice in some of the states: New Jersey: Ch. Rule 51; Crowell v. Botsford, 16 N. J. Eq. 458; Dick. Ch. Prac. 13. Massachusetts: Pub. St. c. 161, § 22; Id. c. 151, § 5; Ch. Rule 1, 14 Gray (Mass.) 351. Maine: Ch. Rules 2, 32, 37 Me. 581, 594; Stephenson v. Davis, 56 Me. 73. New Hampshire: Rules 11-15, 38 N. H. 607, 608, 614. Tennessee: Code (Mill. & V.) § 5083 et seq., and Laws 1877, c. 45. In Massachusetts and Maine a bill or petition in equity may be incorporated in an original suit.

[3] Eq. Rule 11.

[4] Pub. St. Mass. c. 151, § 5; Ch. Rule 1, 14 Gray (Mass.) 351; Rule 2, 37 Me. 581; Langd. Eq. Pl. p. 53, and note.

sequestration by which decrees are carried into effect,[5] and of which the execution is an example at common law.

Subpœna.

The prescribed form of process for appearance in most of the courts of equity in this country is the subpœna, which is a writ, similar in its nature and office to the common-law writ or summons, and issued for the same purpose, viz. to notify the defendant of the commencement of the proceeding against him, and to compel him to appear and answer.[6] Unlike the summons, however, as well as most other writs, the subpœna is usually directed, not to an officer,[7] but to the respondent, or, if there be several, to all, and commands him or them, as the case may be, to appear personally in court on a given day, called the return day, under a penalty named, and answer the bill.[8] In the federal courts it is expressly made "the mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the allegations of the bill";[9] and in state courts of equity it is also the regular process, except where the present English practice of serving a copy of the bill has been established,[10] or other means substituted or allowed alternatively under statutory provisions.[11] In those of the code states where all actions are com-

[5] Post, p. 160.

[6] 2 Smith, Ch. Prac. p. 487; 1 Daniell, Ch. Pl. & Prac. p. 439, note; 1 Barb. Ch. Prac. (2d Ed.) 49.

[7] The common-law writ and summons, as well as the final process in both common law and equity, are directed to the proper officer of the court,—in the state courts to the sheriff, and in the federal courts to the marshal; but the subpœna for witnesses hereafter noticed in the text is always directed to the witness or witnesses whose testimony is desired. In Maine the subpœna is directed to the sheriff of the county or his deputy.

[8] Under the federal practice, the complainant may sue out a separate writ of subpœna against each of several respondents, except in the case of husband and wife, or a joint writ against all. Eq. Rule 12. See, as to the New Jersey practice, Ch. Rule 51; Dick. Ch. Prac. 13.

[9] Eq. Rule 7.

[10] As in Tennessee, when a summons and copy of the bill are served together. Mill. & V. Code, § 5083 et seq., and Laws 1877, c. 45.

[11] See the provisions for inserting a bill or petition in an original writ of attachment or summons. Pub. St. Mass. c. 151, § 5; Rule 2, 37 Me. 581. See Stephenson v. Davis, 56 Me. 73. As to the practice in Connecticut, see Central Manuf'g Co. v. Hartshorne, 3 Conn. 199.

menced in the same manner by the issuance of a summons, after the common-law method, the subpœna is unknown, except as the means of summoning witnesses, or to require the production of books of account or other documentary evidence in the possession of a third person "or a party to the suit." [13] As has been stated, this writ is not properly issued before the bill has been filed. If so issued, it constitutes only an irregularity, which is cured if the defendant enters an appearance.[14] The English orders in chancery and the statute of Anne,[14] as well as the equity rules of the supreme court of the United States, have peremptorily forbidden this premature issuance of the writ; but all seem to have been regarded as directory only, subjecting the party in fault, if advantage is taken by the defendant, to no more than the payment of costs and the necessity of suing out a fresh writ.[15] On the other hand, although the subpœna should not be issued before the bill has been filed, unreasonable delay must not then occur, or the complainant's bill may be ordered taken off the file,[16] and in such case he might also fail to prevent the running of the statute of limitations,[17] the filing of the bill being rendered ineffective for that purpose by the delay in the issuance of the subpœna.

In its form the subpœna in federal practice is issued from the court in which the bill is filed, in the name of the president of the United States,[18] and must bear teste from the day of its issue.[19] If by mis-

[13] In the latter case the writ is called a "subpœna duces tecum." See 1 Beach, Mod. Eq. Prac. §§ 525–528.

[14] Crowell v. Botsford, 16 N. J. Eq. 459, and authorities there cited.

[14] Lord Clarendon's Orders in Chancery in 1661; Beames, Orders in Chancery, 168; Hinde, Ch. Prac. 76.

[15] Crowell v. Botsford, 16 N. J. Eq. 459; 1 Daniell, Ch. Pl. & Prac. 439, note. See, also, as to the practice of the supreme court of the United States, State v. Johnson, 4 Wall. 475; State v. Grant, 6 Wall. 241. An amendment to the bill does not necessarily call for a new subpœna to compel an answer to the bill as amended. Longworth v. Taylor, 1 McLean, 514, Fed. Cas. No. 8,491; Angerstein v. Clarke, 1 Ves. Jr. 250. But see Cooke v. Davies, Turn. & R. 309; Bramston v. Carter, 2 Sim. 458.

[16] Bancroft v. Sawin, 143 Mass. 144, 9 N. E. 539; Coppin v. Gray, 1 Younge & C. Ch. 205.

[17] Coppin v. Gray, supra.

[18] U. S. Sup. Ct. Rule 5, 3 Sup. Ct. vi.

[19] Rev. St. U. S. § 912.

take it antedates the actual filing of the bill, it may be corrected.[20] It must be under the seal of the court from whence it issues, and be signed by the clerk of such court. If issued from the supreme court of the United States, it bears teste of the chief justice of the United States, or, if that office is vacant, of the associate justice next in precedence; if from a district court, it bears teste of the judge, or, if that office is vacant, of the clerk.[21] According to the equity rules, when issued as of course upon the application of the complainant, it is to be made returnable into the clerk's office on the next rule day, or the next rule day but one, at the complainant's election, occurring after 20 days from the time of the issuing thereof. At the bottom of the subpœna must be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable, as otherwise the bill may be taken pro confesso.[22] The return day of the subpœna must be so fixed that the time allowed the defendant, by rule or statute, to appear and plead, may elapse between that and the service upon him,[23] and should not fall upon Sunday, though in the latter case an amendment has been allowed changing the return day to Monday.[24] It

[20] Dinsmore v. Westcott, 25 N. J. Eq. 302.

[21] Rev. St. U. S. § 911.

[22] Eq. Rule 12. In practice, a rule day is the day on which a rule is made returnable, or upon which an act or duty thereby enjoined is to be performed; but in the federal courts the term is applied to the first Monday of every month, on which the office of the clerk of the court shall be open, and the clerk in attendance, "for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings which are grantable of course, and applied for or had by the parties or their solicitors in all causes pending in equity in pursuance of the rules hereby prescribed." Eq. Rule. 2. By rule 3 provision is made for the interlocutory orders, rules, or other proceedings by the court on rule days in vacation, and the proceedings in equity causes are regulated in many respects, as to time, with reference to the rule days after the filing of the bill.

[23] In the federal courts at least 20 days must be preserved between the service and the return day, or it is irregular. Treadwell v. Cleaveland, 3 McLean, 283, Fed. Cas. No. 14,155. In New Jersey 10 days is sufficient. See McEvoy v. Trustees, 38 N. J. Eq. 420. This is a matter dependent upon rules of court or statute, and is always subject to change, as in other details of procedure.

[24] See McEvoy v. Trustees, 38 N. J. Eq. 420.

seems to be no objection, however, that the writ is made returnable on a legal holiday;[25] and, if the copy served differs from the original in stating the return day, the court will still hold jurisdiction if the original writ, correctly stating it, is exhibited to the defendant with the seal of the court impressed thereon.[26]

Service of the Subpœna.

The subpœna, having been issued, must be served upon the defendant, or the court can acquire no jurisdiction over his person.[27] In the federal courts the service must be made "by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case the person serving the process shall make affidavit thereof." [28] In the state courts the service is usually made by the sheriff or his deputies, but may also be made in all, it is believed, by a private person not a party to the suit, though in some states, as in the federal courts, such person must be specially authorized by the court, or the defendant will not be bound to notice it.[29]

[25] Kinney v. Stewart, 37 N. J. Eq. 339.

[26] Low v. Mills, 61 Mich. 35, 27 N. W. 877.

[27] Commissioners of Pilotage v. Low, R. M. Charlt. (Ga.) 298; Jones v. Mason, Term R. (N. C.) 125; Jenney v. Laurens, 1 Spear (S. C.) 356; Peoples v. Stanley, 6 Ind. 410. A person's being in the presence of the court does not authorize the entry of a judgment against him, unless he has been brought into court by legal means. Jones v. Kenny, Hardin (Ky.) 103.

[28] Eq. Rule 15. And see Rev. St. U. S. § 922.

[29] See West v. Smith, 2 N. J. Eq. 309; Allyn v. Davis, 10 Vt. 547; Burlington Bank v. Catlin, 11 Vt. 106; Stone v. Anderson, 5 Fost. (N. H.) 221. Under the civil practice act of Washington, as amended by the Laws of 1871, providing that all common-law actions shall be abolished, but the distinction between actions at law and suits in chancery shall be preserved, and pleadings and proceedings in suits in chancery shall be as prescribed by the laws of the United States and the rules of the United States supreme court, a writ of subpœna in chancery may be served by the sheriff or his deputy as well as by the marshal. Parker v. Dacres, 1 Wash. St. 190, 24 Pac. 192. In Michigan, process must be served by the sheriff, undersheriff, or deputies. If the undersheriff or a deputy is a party, or interested, service upon them may be made by the sheriff. 3 How. Ann. St. § 586; Allen v. Hazen, 26 Mich. 142; Wheeler v. Wilkins, 19 Mich. 78. If the sheriff is a party, or interested, service must be made by one of the coroners. How. Ann. St. § 606; Fletcher v. Lee, 65 Mich. 557, 558, 32 N. W. 817. In case the

The service of the subpœna is, as we have seen, essential in order to give the court jurisdiction over the person of the defendant, unless he voluntarily appears in the suit,[30] and is generally made according to a method prescribed by statutes or rules of court; the one commonly in use being by delivering a copy of the subpœna to the defendant, or to each of several defendants, personally,[31] and, in some cases, reading or exhibiting to him the original, with the seal of the court attached,[32] or by leaving such copy at his present or last usual place of abode, with some adult person residing therein,[33] in both of which cases the service is called "personal service." In most, if not all, the states, also, statutes have been enacted providing for the service of process by publication in a newspaper, where the person upon whom service is to be made is a nonresident, or cannot be

sheriff and coroner are parties or interested, a judge of any circuit court of the state may, in any suit at law or in chancery pending therein, appoint some disinterested person by written order upon the application of any party to the suit, which person is deemed a coroner of the county, and shall proceed in the same manner as the sheriff. 3 How. Ann. St. §§ 7674, 7675. One specially appointed by a sheriff to serve a writ is an officer de facto for that purpose. Jewell v. Gilbert, 64 N. H. 13, 5 Atl. 80. As to sufficiency of a deputation by the United States marshal to serve process, see Martin v. Gray, 142 U. S. [illegible]. 12 Sup. Ct. 186; Jewett v. Garrett, 47 Fed. 625.

[30] As to acceptance of service in the federal courts by one residing without the jurisdiction, see Butterworth v. Hill, 114 U. S. 128, 5 Sup. Ct. 796; U. S. v. Loughrey, 43 Fed. 449. One residing within the jurisdiction may admit service, thus dispensing with the formal action by the officer; but this also must be clearly manifest. See Litchfield v. Burwell, 5 How. Prac. (N. Y.) 342; Ex parte Gibson, 10 Ark. 572; Welch v. Walker, 4 Port. (Ala.) 120; Norwood v. Riddle, 9 Port. (Ala.) 425. And it is generally necessary to prove the signature of the person making the admission. Litchfield v. Burwell, supra, and the cases just cited. In Litchfield v. Burwell, it was held that an admission of service made outside the jurisdiction was of no effect.

[31] As to what is a delivery of process, see Beekman v. Cutter, 2 Code R. (N. Y.) 51; Niles v. Vanderzee, 14 How. Prac. (N. Y.) 547; Davison v. Baker, 24 How. Prac. (N. Y.) 39.

[32] In some states it is required that the original writ be read to the respondent, and the reading alone may be a sufficient service. See Watts v. White, 12 Iowa, 330.

[33] Equity rule 13, and the statutes of the different states. See, under this rule, Hyslop v. Hoppock, 5 Ben. C. C. 447, Fed. Cas. No. 6,988; Kibbe v. Benson, 17 Wall. 625; Phœnix Ins. Co. v. Wulf, 1 Fed. 775.

found within the jurisdiction,[34] and in certain other special cases; but the federal courts have no such method, save as state statutes may be recognized and followed in their practice.[35] As this form of service is constructive only, and not actual, it is only effectual to notify parties of proceedings affecting their property, over which the court has acquired control, and cannot sustain a decree determining their personal rights and obligations. In other words, it may confer jurisdiction to effectually dispose of property, but not over the person of the defendant.[36]

When personal service of the subpœna is made, it must be within the territorial jurisdiction of the court, no person being required to obey or regard process served upon him beyond the limits of the jurisdiction of the court issuing it.[37]

Return of Service.

The officer serving the subpœna, whether sheriff or marshal, or the deputy of either, must return the subpœna to the clerk's office, with his return of service indorsed thereon, to show that the writ has been executed. If the service is made by a private person, he must make affidavit as to the manner of service, this being accepted as of the same effect as the officer's return.[38] The return must show the time, place, and manner of service, or that the party could not be found, according to the fact, and, in a proper case, the court may allow it to be amended.[39]

Substituted Service.

What is known as "substituted service" is often necessary, where an equitable proceeding is brought in aid of, or is otherwise dependent

[34] See the statutes of the several states, and 1 Beach, Mod. Eq. Prac. §§ 181–186, and cases cited.

[35] The only proceeding of this character authorized by act of congress is that providing for substituted service in proceedings in rem.

[36] As to the construction and effect of statutes providing for this remedy, see Pennoyer v. Neff, 95 U. S. 714; Grignon's Lessees v. Astor, 2 How. 319; Erickson v. Nesmith, 46 N. H. 371; Stephenson v. Davis, 56 Me. 75.

[37] See Pacific R. R. v. Missouri Pac. Ry. Co., 1 McCrary, 647, 3 Fed. 772; Bourke v. Amison, 32 Fed. 710; Picquet v. Swan, 5 Mason, 35, Fed. Cas. No. 11,134; Dunn v. Dunn, 4 Paige (N. Y.) 425.

[38] Eq. Rule 15. See, also, West v. Smith, 2 N. J. Eq. 309.

[39] Phœnix Ins. Co. v. Wulf, 1 Fed. 775. See, also, Tallman v. Railroad Co., 45 Fed. 156.

on, an action at law, and the party to the legal action, who is to be served, is not within the jurisdiction of the court, and cannot be reached by a subpœna. In such case, a court of equity will, if necessary to enable it to proceed, order service of the subpœna to be made upon the attorney of such party,[40] provided a previous application has been made to the court for such order, setting forth facts sufficient to warrant its being made.[41]

Writ of Attachment.

Under the old equity procedure, a defendant who disregarded the command of the subpœna was considered to be in contempt, but it is believed that is now only true where the bill calls for a discovery from the defendant, the making of which is necessary before a proper decree can be rendered.[42] The remedy in such a case is the writ of attachment, which we shall hereafter notice in connection with the enforcement of decrees, and which is a process issued by the court against the person of the defendant. Under this process he may be taken into custody, to be held until the desired answer is forthcoming, or until such order as the court may make is complied with.[43]

Amendment of Process.

It is within the power of the court to allow a subpœna to be amended, as, for instance, by the correction of its date, when in fact it was not issued until afterwards,[44] or by changing its return day;[45]

[40] See Dunn v. Clarke, 8 Pet. 1; Abraham v. Insurance Co., 37 Fed. 731.

[41] See Pacific R. Co. v. Missouri Pac. Ry. Co., 1 McCrary, 647, 3 Fed. 772. See, also, Hitner v. Suckley, 2 Wash. C. C. 465, Fed. Cas. No. 6,543; Rubber Co. v. Goodyear, 9 Wall. 807. As to substituted service in proceedings in rem in the federal courts, see Rev. St. U. S. § 738; 18 Stat. 472.

[42] Equity rule 18, as amended October 28, 1878, provides that in case of default the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, "shall be entitled to process of attachment against the defendant to compel an answer," etc.

[43] Post, p. 159.

[44] Bragg v. Greenleaf, 14 Me. 395. And see Jackson v. Bowling, 10 Ark. 578; McLarren v. Thurman, 8 Ark. 313.

[45] When a writ was made returnable at the next term of the court generally, and the defendant appeared at that time, and did not object to the writ until the third term, the court permitted an amendment by inserting the month and day on which it was to be returned. Ames v. Weston, 16 Me. 266. See, also, Lawrence v. Chase, 54 Me. 196.

and the same is true of the return of service, where the rights of third parties are not thereby affected.[46] The power to allow amendments of this character is a discretionary one with the court, and must be invoked at the proper time,[47] and before the rendition of the decree.

APPEARANCE.

30. Appearance is the process or act by which a person, against whom a suit has been commenced, submits himself to the jurisdiction of the court.

31. It may be either:

(a) Voluntary; or

(b) Involuntary, when the defendant is compelled to appear by special process.

32. If voluntary, it may be either:

(a) General, or (p. 76)

(b) Special (p. 76).

33. The appearance may be by formal entry of the fact upon the record, or by any act necessarily involving a submission to the jurisdiction.

34. Appearance may be made, for the purpose of all necessary or appropriate defenses, before the service of a subpœna, in which case it is called an "appearance gratis."

After personal service of the subpœna, the next step is for the defendant to appear in the suit, in obedience to the command of the writ, and this, theoretically, at least, is as necessary in equity practice as at common law. Under the latter system, this step, either by the defendant himself or by the plaintiff for him, was a prerequisite to the rendition and entry of a judgment; and under the former chancery practice it was necessary for the defendant or his solicitor to cause a formal entry of the fact to be made in the office of the clerk of the

[46] Phœnix Ins. Co. v. Wulf, 1 Fed. 775.

[47] See post, p. 99. "Amendment" as to the time when an application should be made.

proper court.[1] The practice in this respect is regulated by statutes and rules of court, and in the federal courts the service of the subpœna on the defendant is now treated as equivalent to an actual appearance, and the latter as sufficiently indicated as a party on the record.[2] The formal entry, if necessary, would in any case be dispensed with by the defendant's taking any part in the proceedings in court except for some special object falling short of an indication of an intention to defend the suit on its merits;[3] as by such act he would submit himself, unconditionally, to the jurisdiction of the court, and entitle the complainant to proceed. Thus, filing an answer, or any pleading necessary or proper for the defendant to make, signed by counsel,[4] or a petition to remove a cause from a state to a federal court,[5] or the filing and use of an agreement by a solicitor for the purposes of a motion,[6] have been held to be sufficient. A defendant already named as such on the record may, if the complainant consents, enter his appearance at the hearing,[7] and, it seems, may appear at that time, though not so named, if all parties consent.[8]

As to the time for an appearance, this is generally indicated by the subpœna, under the rules of the court. In the federal courts it is provided that the appearance day shall be the rule day to which the subpœna is made returnable, provided the respondent has been served with the process 20 days before that day; otherwise the appearance day shall be the next rule day succeeding the rule day on which the process is returnable. The appearance,

§§ 30–34. [1] Eq. Rule 17; Treadwell v. Cleaveland, 3 McLean, 283, Fed. Cas. No. 14,155.

[2] Sweeney v. Coffin, 1 Dill. 73, 75, Fed. Cas. No. 13,686; Fowlkes v. Webber, 8 Humph. (Tenn.) 530. See Eq. Rule 17.

[3] See Proudfit v. Picket, 7 Cold. (Tenn.) 563; Pugsley v. Trust Co., 2 Tenn. Ch. 130; Livingston v. Gibbons, 4 Johns. Ch. (N. Y.) 94.

[4] See Proudfit v. Picket, 7 Cold. (Tenn.) 563; Livingston v. Gibbons, 4 Johns. Ch. (N. Y.) 94; Pugsley v. Trust Co., 2 Tenn. Ch. 130.

[5] Sweeney v. Coffin, 1 Dill. 73, 75, Fed. Cas. No. 13,686. Moving to dismiss for want of jurisdiction, Jones v. Andrews, 10 Wall. 327; but not to strike case from docket, Dorr v. Gibboney, 3 Hughes, 382, Fed. Cas. No. 4,006.

[6] See Pugsley v. Trust Co., 2 Tenn. Ch. 130.

[7] Attorney General v. Pearson, 7 Sim. 290, 302.

[8] Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449. See, also, Kentucky Silver Min. Co. v. Day, 2 Sawy. 468, Fed. Cas. No. 7,719.

whether by the defendant personally or by his solicitor, must be entered by the clerk in the order book on the day when made.[9]

The entry of appearance by a solicitor, if authorized, is binding upon the defendant, and such authority is presumed from the fact of the entry itself;[10] but this presumption is not conclusive, and may be destroyed by affirmative proof that the act was unauthorized, if offered immediately after the fact is known. In such case, the defendant would, of course, be relieved.[11]

General Appearance.

If the appearance is voluntary, it may be either general or special, but will be presumed to be the first, unless the contrary and the special object clearly appear.[12] A general appearance is either by the formal entry of appearance, without any qualification, or by any act which evidences an intention to contest the whole or a part of the complainant's case on its merits, and is a waiver of all objection to the service of or want of service of process as well as to the jurisdiction of the court.[13] Thus, moving for a continuance of the cause to the next term,[14] or demurring to the bill for want of equity,[15] are general appearances, as is also the filing of an answer.[16]

Special Appearance.

A special appearance is one where the defendant appears in the suit only for some special object, which does not involve any contest of the merits of the complainant's case,[17] as by motion to

[9] Eq. Rule 17.

[10] Osborn v. Bank, 9 Wheat. 738. See, also, Dey v. Telephone Co., 41 N. J. Eq. 419, 4 Atl. 675.

[11] Mutual Life Ins. Co. v. Pinner, 43 N. J. Eq. 52, 10 Atl. 184. See, also, Shelton v. Tiffin, 6 How. 163; Dey v. Telephone Co., 41 N. J. Eq. 419, 4 Atl. 675.

[12] Deshler v. Foster, Morris (Iowa) 403.

[13] See Knox v. Summers, 3 Cranch, 496; Shields v. Thomas, 18 How. 253; Payne v. Bank, 29 Conn. 415; Miles v. Goodwin, 35 Ill. 53; Winter v. Rose, 32 Ala. 447.

[14] Straus v. Weil, 5 Cold. (Tenn.) 120. See Baisley v. Baisley, 113 Mo. 544, 21 S. W. 29.

[15] See Hale v. Insurance Co., 12 Fed. 359.

[16] Proudfit v. Picket, 7 Cold. (Tenn.) 563.

[17] The rule here seems to be the same as at common law. As to what

set aside the proceedings for want of proper service of the subpœna,[18] the object of the special appearance being ordinarily to oppose the jurisdiction of the court. Such an appearance is also called a "conditional" one where a defendant, in a case in which the court can acquire jurisdiction by a voluntary appearance, is served with process outside the district, and enters an appearance for the purpose of testing the jurisdiction of the court over him, at the same time undertaking or stipulating to submit to its orders without further service of process, if the decision be against him.[19]

As has been stated, this right to appear specially to object to the jurisdiction is lost, if the defendant, in the first instance, either formally appears generally, or takes any part in the proceedings amounting to a general appearance.[20]

Appearance Gratis.

An appearance gratis is one where the defendant, without waiting for the service of the subpœna upon him, voluntarily appears in the suit. Such an appearance may have for its object merely the presentment of his defense without loss of time,[21] or, where an injunction has already been issued, but service upon the defendant is delayed, to move for a dissolution of the injunction by reason of the delay;[22] or to advance the cause by having it placed on the docket so as to obtain an early hearing.[23] It cannot, however, deprive the complainant of any right he may have to an injunction ex parte, and the time it is actually made fixes the commencement

formal method must be followed in appearing specially, see Romaine v. Insurance Co., 28 Fed. 625.

[18] The entry of a general appearance is a waiver of all defects in the service of process upon the defendant appearing. See Perkins v. Hendryx, 40 Fed. 657; Buerk v. Imhaeuser, 8 Fed. 457; Goodyear v. Chaffee, 3 Blatchf. 268, Fed. Cas. No. 5,564.

[19] See Romaine v. Insurance Co., 28 Fed. 625, where the practice is illustrated and explained.

[20] Ante, p. 76.

[21] See Fell v. College, 2 Brown, Ch. 279.

[22] See Howe v. Willard, 40 Vt. 654; Waffle v. Vanderheyden, 8 Paige (N. Y.) 45.

[23] See Aller v. Jones, 15 Ves. 605.

of the period allowed for the demurrer, plea, or answer that is to follow.[24]

PROCEEDINGS ON DEFAULT.

35. If the defendant, after being served with the subpœna, fails to appear on or before the day at which the writ is returnable, the allegations of the bill may be taken as admitted, and a decree pro confesso entered against him.

36. If the defendant, after having appeared, fails to demur, plead, or answer within the time limited, the bill may likewise be taken pro confesso.

37. Although an answer has been interposed, a decree pro confesso may still be entered, if such answer is materially defective or irregular.

38. Where several defendants are jointly interested, and the bill is dismissed in favor of one or more of them who have appeared, a decree cannot be entered against those in default.

39. Where a bill has been taken pro confesso, if the allegations of the bill are distinct and positive, they may be taken as true without proof; but if indefinite, or if the nature of the complainant's demand is uncertain, proof is necessary.

40. After a bill is taken pro confesso, the defendant is in general estopped from resisting liability, when the facts alleged in the bill make a case against him, though if he has appeared, and the confession is only for want of an answer, he may still question the form of the decree, and may appeal therefrom.

We have already seen that, in case of disregard of the command of the subpœna by the defendant, the complainant may compel

[24] See Webster v. Threlfall, 1 Sim. & S. 135.

him to appear and answer by means of a writ of attachment against his person, whenever a discovery by him is necessary to complete the facts of the complainant's case and enable him to obtain a proper decree.[1] If no such discovery is required, and the respondent, after being served, has appeared, but neglects to offer any form of defense within the time allowed, or neglects both appearance and defense, the complainant is generally entitled to an order of court that the facts of the bill shall be taken as admitted, and a decree pro confesso entered against him.[2] The practice of thus treating the defendant's neglect or refusal to plead as an admission of the facts charged in the bill is a very ancient one, and is still fully recognized and followed, though under somewhat different regulations, for detailed information as to which statutes and rules of court must be consulted.[3] Formerly the admission

§§ 35–40. [1] Ante, p. 73.

[2] Beach, Mod. Eq. Prac. §§ 191, 192. As to the return of a decree pro confesso, see Thompson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788. See Eq. Rules 18, 19, as to the practice in the federal courts in cases of failure to answer. By the rules of the supreme court, a decree pro confesso may be had if the defendant, on being served with process, fails to appear within the time required; or if, having appeared, he fails to plead, demur, or answer to the bill within the time limited for that purpose; or if he fails to answer after a former plea, demurrer, or answer is overruled or declared insufficient. Thompson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788. A defendant, after the entry of the decree pro confesso, and while it stands unrevoked, is absolutely barred and precluded from alleging anything in derogation of or in opposition to the said decree, and he is equally precluded from questioning its correctness on appeal unless, on the face of the bill, it appeared manifest that it was erroneous, and improperly granted. Thompson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788.

[3] As to the practice in the federal courts, see Eq. Rules 18, 19. A confession of facts, properly pleaded, dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a decree pro confesso regards the statements of the bill as confessed. Thompson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788. To take a bill pro confesso is to order it to stand as if its statements were confessed to be true; and a decree pro confesso is a decree based upon such statements, assumed to be true. Such a decree is as binding and conclusive as any decree rendered in most solemn manner. Thompson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788. "By the early practice of the civil law, failure to appear at the day to which the cause was adjourned was deemed a confession of the action; but in later

was not fully operative without proof, by the complainant, of the facts material to his case; but the general rule at present seems

times this rule was changed, so that the plaintiff, notwithstanding the contumacy of the defendant, only obtained judgment in accordance with the truth of the case as established by an ex parte examination. Keller, Proced. Rom. § 69. The original practice of the English court of chancery was in accordance with the later Roman law. Hawkins v. Crook, 2 P. Wms. 556. But for at least two centuries past bills have been taken pro confesso for contumacy. Id. Chief Baron Gilbert says: 'Where a man appears by his clerk in court, and after lies in prison, and is brought up three times to court by habeas corpus, and has the bill read to him, and refuses to answer, such public refusal in court does amount to the confession of the whole bill. Secondly. When a person appears and departs without answering, and the whole process of the court has been awarded against him after his appearance and departure, to the sequestration, there also the bill is taken pro confesso, because it is presumed to be true when he has appeared, and departs in despite of the court, and withstands all its process without answering.' Forum Romanum, 36. Lord Hardwicke likened a decree pro confesso to a judgment by nil dicit at common law, and to judgment for plaintiff on demurrer to the defendant's plea. Davis v. Davis, 2 Atk. 21. It was said in Hawkins v. Crook, supra, and quoted in 2 Eq. Cas. Abr. 179, that 'the method in equity of taking a bill pro confesso is consonant to the rule and practice of the courts at law, where, if the defendant makes default by nil dicit, judgment is immediately given in debt, or in all cases where the thing demanded is certain; but where the matter sued for consists in damages, a judgment interlocutory is given, after which a writ of inquiry goes to ascertain the damages, and then the judgment follows.' The strict analogy of this proceeding in actions of law to a general decree pro confesso in equity in favor of the complainant, with a reference to a master to take a necessary account, or to assess unliquidated damages, is obvious and striking. A carefully prepared history of the practice and effect of taking bills pro confesso is given in Williams v. Corwin, Hopk. Ch. (N. Y.) 471, by Hoffman, master, in a report made to Chancellor Sanford of New York, in which the conclusion come to (and adopted by the chancellor) as to the effect of taking a bill pro confesso was that 'when the allegations of a bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs,' and a decree will be made accordingly; but 'where the allegations of a bill are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which, from their nature, and the course of the court, require an examination of details, the obligation to furnish

to be that, where the allegations of the bill are distinct and positive, and the defendant is an adult person, proof is not required;

proofs rests on the complainant.' We may properly say, therefore, that to take a bill pro confesso is to order it to stand as if its statements were confessed to be true, and that a decree pro confesso is a decree based on such statements, assumed to be true (1 Smith, Ch. Prac. 153), and such a decree is as binding and conclusive as any decree rendered in the most solemn manner. 'It cannot be impeached collaterally, but only upon a bill of review or (a bill) to set it aside for fraud.' 1 Daniell, Ch. Pl. & Prac. (1st Ed.) 696; Ogilvie v. Herne, 13 Ves. 563. Such being the general nature and effect of an order taking a bill pro confesso, and of a decree pro confesso regularly made thereon, we are prepared to understand the full force of our rules of practice on the subject. Those rules, of course, are to govern so far as they apply; but the effect and meaning of the terms which they employ are necessarily to be sought in the books of authority to which we have referred. By our rules a decree pro confesso may be had if the defendant, on being served with process, fails to appear within the time required; or if, having appeared, he fails to plead, demur, or answer to the bill within the time limited for that purpose; or if he fails to answer after a former plea, demurrer, or answer is overruled or declared insufficient. The twelfth rule in equity prescribes the time when the subpœna shall be made returnable, and directs that 'at the bottom of the subpœna shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.' The eighteenth rule requires the defendant to file his plea, demurrer, or answer (unless he gets an enlargement of the time) on the rule day next succeeding that of entering his appearance; and in default thereof the plaintiff may, at his election, enter an order (as of course) in the order book that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of 30 days from the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, etc. And the nineteenth rule declares that the decree rendered upon a bill taken pro confesso shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. It is thus seen that by our practice a decree pro confesso is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it, but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill assumed to be true. This gives it the greater

but if there is any uncertainty in the bill, or in the nature of the complainant's demand, the requisite certainty must be supplied

solemnity, and accords with the English practice, as well as that of New York. Chancellor Kent, quoting Lord Eldon, says: 'Where the bill is thus taken pro confesso, and the cause is set down for hearing, the course, says Lord Eldon in Geary v. Sheridan, 8 Ves. 192, 'is for the court to hear the pleadings, and itself to pronounce the decree, and not to permit the plaintiff to take, at his own discretion, such a decree as he could abide by, as in the case of default by the defendant at the hearing.' Rose v. Woodruff, 4 Johns. Ch. (N. Y.) 547, 548. Our rules do not require the cause to be set down for hearing at a regular term, but, after the entry of the order to take the bill pro confesso, the eighteenth rule declares that thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of 30 days from the entry of such order, if it can be done without answer, and is proper to be decreed. This language shows that the matter of the bill ought at least to be opened and explained to the court when the decree is applied for, so that the court may see that the decree is a proper one. The binding character of the decree, as declared in rule 19, renders it proper that this degree of precaution should be taken. * * * In thus considering the case on its merits, as presented by the evidence taken before the master, his report thereon, and the exceptions to such report, we have deemed it unnecessary to make any remarks as to the status of a defendant before a master on a reference under a decree pro confesso. Both parties in this case seem to have taken for granted that the rights of the defendants were the same as if the decree had been made upon answer and proofs. In the English practice, it is true, as it existed at the time of the adoption of our present rules (in 1842), the defendant, after a decree pro confesso, and a reference for an account, was entitled to appear before the master, and to have notice of and take part in the proceedings, provided he obtained an order of the court for that purpose, which would be granted on terms. 2 Daniell, Ch. Pl. & Prac. (1st Ed.) 804; Id. (2d Ed., by Perkins) 1358; Heyn v. Heyn, Jac. 49. The former practice in the court of chancery of New York was substantially the same. 1 Hoff. Ch. Prac. 520; 1 Barb. Ch. Prac. 479. In New Jersey, except in plain cases of decree for foreclosure of a mortgage (where no reference is required), the matter is left to the discretion of the court. Sometimes notice is ordered to be given to the defendant to attend before the master, and sometimes not; as it is also in the chancellor's discretion to order a bill to be taken pro confesso for a default, or to order the complainant to take proofs to sustain the allegations of the bill. Nixon, Dig. Art. 'Chancery,' § 21; Gen. Ord. Ch. xiv., 3–7; Brundage v. Goodfellow, 8 N. J. Eq. 513. As we have seen, by our eighteenth rule in equity it is provided that, if the defendant make default in not filing his plea, demurrer, or answer in proper time, the plaintiff may, as one al-

by evidence.[4] And if the defendant is an infant,[5] or if he simply refuses to plead,[6] proof is also required. An irregular or frivolous or insufficient answer, being legally no answer at all, may be ordered to be taken off the files, and a decree pro confesso entered;[7] but in case of default by one of several defendants jointly interested, where the rest obtain a dismissal of the bill, such dismissal will inure to the benefit of all, in the absence of fraud or collusion among them, although an order taking the bill pro confesso has been obtained against the one in default.[8] To this end, however, it is necessary that all the defendants have a joint interest, so that the disposition of the suit must necessarily be to bind or relieve all.[9] The practice is not uniform as to whether, in case of

ternative, enter an order as of course that the bill be taken pro confesso, 'and thereupon the cause shall be proceeded in ex parte.' The old rules, adopted in 1822, did not contain this ex parte clause. They simply declared that if the defendant failed to appear and file his answer within three months after appearance day, the plaintiff might take the bill for confessed, and that the matter thereof should be decreed accordingly; the decree to be absolute unless cause should be shown at the next term. See Eq. Rules 6, 10, of 1882, 7 Wheat. xviii.; Pendleton v. Evans, 4 Wash. C. C. 336, Fed. Cas. No. 10,920; and O'Hara v. MacConnell, 93 U. S. 150. Under these rules the English practice was left to govern the subsequent course of proceeding, by which, as we have seen, the defendant might have an order to permit him to appear before the master, and be entitled to notice. Whether, under the present rules, a different practice was intended to be introduced, is a question which it is not necessary to decide in this case." Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788, 791.

[4] See Pegg v. Davis, 2 Blackf. (Ind.) 281; Williams v. Corwin, 1 Hopk. Ch. (N. Y.) 471; Ohio Cent. R. Co. v. Central Trust Co. of New York, 133 U. S. 83, 10 Sup. Ct. 235. A default does not admit that the allegations of the bill are sufficient to support a decree. Koster v. Miller, 149 Ill. 195, 37 N. E. 46.

[5] Chaffin v. Heirs of Kimball, 23 Ill. 36; Massie's Heirs v. Donaldson, 8 Ohio, 377.

[6] Caines v. Fisher, 1 John. Ch. (N. Y.) 8. But see McDowell v. Goldsmith, 2 Md. Ch. 370.

[7] See Davis v. Davis, 2 Atk. 21, 24; Caines v. Fisher, 1 Johns. Ch. (N. Y.) 8; Denison v. Bassford, 7 Paige (N. Y.) 370; Smith v. Insurance Co., 2 Tenn. Ch. 599, 605.

[8] See Clason v. Morris, 10 Johns. (N. Y.) 524; Kopper v. Dyer, 59 Vt. 477, 9 Atl. 4; Butler v. Kinzie, 90 Tenn. 31, 15 S. W. 1068; Terry v. Fontaine's Adm'r, 83 Va. 451, 2 S. E. 743.

[9] Butler v. Kinzie, 90 Tenn. 31, 15 S. W. 1068.

amendment of the bill after service of process, a decree pro confesso upon the bill as amended may be had without the service of a new subpœna,[10] but it seems to be settled that any amendment of the bill after an order taking the bill as confessed, or a decree pro confesso has been made, vitiates the proceedings, and renders the order or decree void.[11]

According to the old English practice, the complainant was entitled to a decree pro confesso as of course, but in our federal courts, at least, only such decree will be made by the court as seems proper upon the allegations of the bill which have been assumed to be true.[12] In other words, the decree is not what the complainant chooses, nor necessarily according to the prayer of the bill, but what the court determines, upon the statements of the bill, to be the proper decree upon the admitted facts.[13]

Effect of the Decree Pro Confesso.

In general, it may be stated that a decree pro confesso concludes the defendant as to all material facts in the bill which are well pleaded, when such facts establish a case against him.[14] If he has neither appeared nor answered, it seems that the decree is final, unless opened by the court upon a proper showing, after an application seasonably made; but one who has appeared, and then failed to answer, may still object, upon appeal, that the allegations of the bill do not legally warrant its rendition. An order taking a bill as confessed is of no effect, unless followed by or included in a final decree.[15]

[10] See Bond v. Howell, 11 Paige (N. Y.) 233; Bank of Utica v. Finch, 1 Barb. Ch. (N. Y.) 75; Jackson v. Edwards, 2 Edw. Ch. (N. Y.) 582; Trust & Fire Ins. Co. v. Jenkins, 8 Paige (N. Y.) 589. See, also, Harris v. Deitrich, 20 Mich. 366.

[11] Weightman v. Powell, 2 De Gex & S. 570.

[12] Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788. See, also Ohio Cent. R. Co. v. Central Trust Co. of New York, 133 U. S. 83, 10 Sup. Ct. 235.

[13] Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788.

[14] See White v. Lewis, 2 A. K. Marsh. (Ky.) 123; McDonald v. Insurance Co., 56 Ala. 468; Gault v. Hoagland, 25 Ill. 266; Kell v. West, 21 Fla. 508.

[15] Lockhart v. Horn, 3 Woods. 542, Fed. Cas. No. 8,446.

Opening Decrees Pro Confesso.

There is no general rule as to a defendant's obtaining relief from a decree pro confesso, but such a decree may be set aside by the court, in the exercise of its discretion, upon a proper showing that grounds for its action exist, and that the defendant seeking relief has a meritorious defense.[16] Mistakes apparent upon the face of the record, or clear instances of surprise, may afford ground for this relief, even after the decree has been enrolled;[17] but the applicant must not be guilty of unreasonable delay, and the showing of a valid and meritorious defense is indispensable.[18] The usual practice is to proceed by motion, accompanied by a sworn answer, setting up the defense which is sought to be interposed, or, at the least, an affidavit setting up the facts of such a defense.[19]

[16] See Williamson v. Sykes, 13 N. J. Eq. 182; Van Deventer v. Stiger, 25 N. J. Eq. 224; Carpenter v. Muchmore, 15 N. J. Eq. 123; Mutual Life Ins. Co. of New York v. Sturges, 32 N. J. Eq. 678; McGowan v. James, 12 Smedes & M. (Miss.) 445. But not to let in an unconscionable or dishonest defense. King v. Exchange Co., 2 Sandf. (N. Y.) 692. See, also, Maynard v. Pereault, 30 Mich. 160.

[17] Kemp v. Squire, 1 Ves. Sr. 205; Embury v. Bergamini, 24 N. J. Eq. 227.

[18] See Williams v. Thompson, 2 Brown, Ch. 279; Keil v. West, 21 Fla. 508. It is provided by equity rule 19 that the "decree rendered (in default) shall be deemed absolute unless the court shall at the same term set aside the same, or enlarge the time for filing the answer upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon payment of the costs * * * and unless the defendant shall undertake to file his answer within such time as the court shall direct," etc. As to a default improperly entered, see Fellows v. Hall, 3 McLean, 281, Fed. Cas. No. 4,722. A default will be opened only to put in an answer to the merits, not a plea. See Bank of St. Marys v. St. John, 25 Ala. 566.

[19] See Wells v. Cruger, 5 Paige (N. Y.) 164; Emery v. Downing, 13 N. J. Eq. 59; Montgomery v. Olwell, 1 Tenn. Ch. 169, 172; Pittman v. McClellan, 55 Miss. 290.

DEFENSE.

41. "Defense," broadly defined, is the formal assertion by the defendant that the complainant has no ground for his suit, denying or objecting to the truth or validity of the formal charge or bill.

42. Defenses, in equity, as at law, may be either:

(a) Dilatory, or (p. 86)

(b) Peremptory, or permanent (p. 89).

In opposition to the bill of complaint, the defendant must interpose a defense by one of the methods known to equity procedure, as no right can be justly decided, or controversy settled, without hearing both parties; and the subpœna itself is, as we have seen, issued to require the defendant to present his answer, and show just cause, if he can, why the complainant's charge should not be allowed. When a suit has been instituted against him, the defendant should either disclaim all right or interest in the subject-matter in dispute, or insist upon his right and defend it. The methods of doing so will next be considered, among which will be noticed the disclaimer, which, though hardly a method of defense, strictly speaking, is treated as such for the reason that it can rarely be used alone, but must generally be accompanied by an answer.

The modes of defense available will be considered with reference to their nature and the manner of presenting them.

SAME—DILATORY DEFENSES.

43. Dilatory defenses are those which, without impeaching the complainant's right to relief, operate to suspend the particular suit until some obstacle to its enforcement in that suit has been removed.

44. Dilatory defenses in equity are:

(a) Objections to the jurisdiction (p. 87).

(b) Objections to the person of the complainant or defendant (p. 87).

(c) Objections to the form of proceeding (p. 87).
(d) Objection that another suit is pending between the same parties (p. 88).

"Dilatory defenses," as the name implies, merely operate to suspend or delay the present suit until some obstacle to the complainant's right of recovery has been removed, in the same manner as at common law. Though not favored by the courts, they are still effectual to suspend the proceedings when well founded.

Want of Jurisdiction.

Objections to the jurisdiction as a defense rest simply upon the claim or fact that the court in which the suit is instituted has no authority to take cognizance of the controversy, without in any way disputing or impeaching the right or interest of the complainant in its subject-matter. Objections to the jurisdiction are usually taken by way of plea, and will be more fully considered hereafter.[1]

Disability of Complainant.

Defenses based on objections to the person of the plaintiff are usually taken by plea. "Pleas to the person," as they are called, do not deny the existence of the right claimed, nor the jurisdiction of the court to determine it, but simply that the complainant has not the legal capacity to maintain the suit by reason of some personal disability, either absolute or partial, as where the complainant is an alien enemy, or an infant, or a married woman suing alone; or that the complainant is a fictitious person, or is not the person he claims to be, or does not sustain the character he assumes, as when he sues as, but is not, an executor or assignee.[2]

Objections to the Form of Proceedings.

This defense is that the suit is irregularly brought, or defective in its appropriate allegations or parties; as, for example, when a bill not a bill of review, nor in the nature of a bill of review, is brought to set aside or vary a decree not impeached for fraud.[3]

§§ 43–44. [1] Post, c. 7. [2] Post, c. 7.
[3] Post, c. 4; ante, c. 3, "Bill of Review."

Pendency of Another Suit.

The pendency of another suit between the same parties, upon the same cause of action, and for the same relief, in another court of equity of the same state, is a defense to a suit commenced in a court of equity of that state,[4] and one so pending in a court of equity of the United States to a second commenced in a federal court of equity of the same district.[5] As to state courts, since the states are legally foreign to each other, an action pending in another state would not constitute such a defense, though between the same parties and identical as to facts and relief sought; and it seems to be also settled that the same is true as between a state and federal court in the same federal district.[6] Whether the pendency of another suit for the same cause in one federal court would be a defense to one commenced in any other federal court, without regard to territorial limitations, appears to be still unsettled, but the rule would probably be applied that one circuit, at least, is foreign, for this purpose, to another.[7]

If the suit already pending is to be relied upon as a defense, it must be not only between the same parties, but must be for the same purpose as the second, and justify substantially the same relief.[8] This method of defense will be again considered hereafter.[9]

[4] See Radford v. Folsom, 14 Fed. 97; post, c. 7.

[5] But not a suit in a state or federal court to one in another court of the same district. Andrews v. Smith, 5 Fed. 833.

[6] See Andrews v. Smith, 5 Fed. 833.

[7] See 1 Fost. Fed. Prac. (2d Ed.) § 129, and cases cited.

[8] See Hertell v. Van Buren, 3 Edw. Ch. (N. Y.) 20; Stout v. Lye, 103 U. S. 66; Watson v. Jones, 13 Wall. 679; American Bible Soc. v. Hague, 4 Edw. Ch. (N. Y.) 117.

[9] Post, c. 7, p. 461.

SAME—PEREMPTORY OR PERMANENT DEFENSES.

45. Peremptory or permanent defenses are those which go to the foundation of the suit, and, when established, become a complete bar to the complainant's claim.

46. Peremptory defenses are of two kinds:

(a) Those which deny the existence of any right of the complainant to sue, past or present (p. 89).

(b) Those which, admitting the existence at one time of such right, insist that it has been extinguished or determined (p. 90).

Peremptory defenses, as above stated, are defenses to the suit on its merits, like pleas in bar at common law, and, if successfully maintained, result in the defeat of the complainant's claim by an adjudication upon the merits of the cause, instead of merely delaying the enforcement of his rights, as in the case of those just considered.

Want of Complainant's Right to Sue.

The first of the two classes into which defenses of this character are divided includes those by which the defendant insists that the complainant never had any right to institute the suit. This defect is generally expressed as the want of interest of the complainant, either in the subject-matter, or, if the latter exists, to assert any claim against the defendant.[1] Both this and the succeeding class of defenses will be considered at length hereafter, but it may be generally stated here that the absence of the complainant's right to sue may occur in four instances: (1) When he has not a superior right to that of the defendant, as when a bill is filed to affect the rights of one who is a purchaser of property for a valuable consideration, without notice, the combination of these two conditions giving him a valid right or title to such property;[2] (2) when the defendant has no interest in the controversy, and the

§§ 45–46. [1] Post, c. 4.

[2] See Mitf. Eq. Pl. (Jeremy's Ed.) 199, 274; Jerrard v. Saunders, 2 Ves. Jr. 454; Story, Eq. Pl. §§ 603–604a, 805.

complainant has therefore no right to sue him;[3] (3) when the complainant has no right to sue because he has no interest, as where he sues on a contract within the statute of frauds, when in making such contract the requirements of the statute have not been complied with;[4] (4) when there is no privity between complainant and defendant,[5] or any other right to maintain the suit.

Where Right has been Extinguished or Determined.

The second class of peremptory defenses embraces those where a right to sue has once existed, but has been determined by the acts of the parties, the operation of law, or by a judicial decision. These cases, generally stated, are the following: (1) Those where the right to recover upon an existing contract has been expressly waived or disposed of by the parties themselves, as by an account stated, or a release, or nullified by operation of law, as where barred by the statute of limitations;[6] (2) those where there has been a determination or decision of the matters in dispute between the same parties, by a judicial or a quasi judicial tribunal, as by any court of competent jurisdiction, or by arbitrators lawfully appointed, and rendering an award within the scope of their powers.[7] The distinction between these two classes of defenses is plain, but the effect of either is the defeat of the complainant's claim.

FORMAL MODES OF DEFENSE.

47. The defenses already enumerated may be asserted either:

(a) By disclaimer (p. 91).

(b) By demurrer (p. 92).

(c) **By plea** (p. 93).

(d) By answer (p. 94).

(e) By the union, in a proper case, of two or more of the methods above named (p. 91).

(f) By a cross bill, in cases where affirmative relief against the complainant is sought (p. 303).

[3] See Story, Eq. Pl. §§ 519, 520, and cases cited.

[4] See Story, Eq. Pl. §§ 503, 761. See, also, Cozine v. Graham, 2 Paige (N. Y.) 177.

[5] See Story, Eq. Pl. § 262.

[6] See Story, Eq. Pl. §§ 751, 796–798.

[7] See Story, Eq. Pl. §§ 780, 803.

48. If more than one method of defense is used to oppose the same bill, each defense must clearly refer to and oppose separate and distinct parts of the bill; but the same matter of defense may sometimes be asserted either by demurrer, plea, or answer.

The selection of the mode of defense to be employed must depend, of course, upon the defendant's decision, upon advice of counsel, as to what the allegations of the bill and the facts of his own case require. In some cases the only method available will be by demurrer, plea, or answer, respectively, and then such mode must be adopted. In other cases, the same matter may be asserted by any one of the three methods last mentioned; and, in still others, he may both demur, plead, answer, and disclaim to different and distinct parts of the same bill, but in the latter case he must not only frame his modes of procedure to that end, but each must clearly refer upon its face to the part to which it is directed. A plea cannot generally be filed to a part of the bill to which he has already demurred, nor an answer to any part to which he has already demurred or pleaded, nor can an answer claim what a disclaimer has renounced.

THE DISCLAIMER.

49. A "disclaimer" is the formal written assertion that the defendant disclaims all right, title, or interest in or to the subject-matter of the demand made by the complainant's bill. It is seldom used without an accompanying answer, as the complainant may be entitled to an answer to ascertain whether the defendant is entitled to disclaim.

While perhaps not strictly a method of defense, the disclaimer is usually classed as such, since it is a mode of proceeding open only to the defendant, and may enable him to free himself from all liability in connection with the particular suit. As its name implies, it is a formal written statement, disclaiming or renouncing all interest whatsoever in the subject-matter in controversy. It is not often used alone, however, since the complainant may be fairly

entitled to an answer in addition, in order that it may appear from the facts, whether the defendant can properly release himself from his position as a party on the record; as, while he may actually have no interest himself, his presence may, as we have elsewhere noticed, be necessary to a proper determination of the rights of the complainant, and for such reasons an accompanying answer is generally required.[1]

THE DEMURRER.

50. If the defendant wishes to oppose the bill of complaint for some reason apparent on its face, as by objecting to the jurisdiction of the court, the person of the complainant, or the matter of the bill itself, in substance or form, he must do so by a demurrer.

51. A demurrer is available only in opposition to the bill, and cannot be taken to any of the other pleadings in the suit.

If, upon examination, the bill appears defective upon its face, in disclosing a want of jurisdiction in the court, or of capacity of the complainant to sue, or defects either in the form or substance of the bill itself, any of which appear to supply sufficient grounds for objecting to the bill as filed, the proper course is to file a demurrer.[1] By this form of defense he admits the facts alleged in the bill to be true, but denies that they are sufficient to justify the complainant in proceeding, or to oblige him (the defendant) to answer, and prays the judgment of the court as to whether he shall be compelled to answer the bill or that part of it to which the demurrer is directed.[2]

The nature and office of the demurrer is fully considered in a subsequent chapter, and need not be examined here. It is so called from the Latin "demorari," or the French "demorrer" ("to wait or stay"); and is strictly an excuse for not answering, on the ground that the complainant has not set forth a case requiring one. Equity borrows this method of defense from the common law, the de

§ 49. [1] Post, c. 5. §§ 50–51. [1] Post, c. 6.
[2] Post, c. 6; Ford v. Peering, 1 Ves. Jr. 72, 77.

murrer being unknown to the civil law in the practice of the ecclesiastical courts, and, while its scope is here more extended, its effect is the same as at common law, in raising a question of law only, as to the right and liability upon the facts stated.[3] The demurrer in equity is used only in opposition to the bill, including the cross bill, and cannot be taken by the complainant to the plea or answer of the defendant, nor by the latter to the replication of the former.[4] As a demurrer seeks the judgment of the court as to whether a plea or answer is necessary, a following plea or answer will overrule or waive the demurrer, if directed to the same matter as the demurrer opposes.[5]

THE PLEA.

52. If the defendant wishes to oppose the bill upon a ground not involving a contest upon its merits, and not appearing upon the face of the bill, he must do so by plea.

53. The plea shows or relies upon one or more grounds why the suit should be dismissed, delayed, or barred, and must reduce the case or some part of it to a single point, thereby creating a bar to the whole suit or to the part to which it applies.

The plea is always the mode of defense where reasons exist why the suit should be dismissed, delayed, or barred, and where these do not appear upon the face of the bill itself, or, as it is expressed, are dehors the bill. It bears a resemblance to the exception of the civil law, and differs from an answer in the common form, in that it demands the judgment of the court in the first instance whether the matter urged by it does not debar the complainant from his right to the answer prayed for by the bill. Its object is one of utility, since it aims to save the parties the expense of an examination of witnesses, and it is for this very reason that not every de-

[3] Post, c. 6. [4] Post, c. 6.

[5] Post, c. 6. See, also, Eq. Rule 37, as to the rule in the federal courts. Crescent City Live-Stock, Landing & Slaughterhouse Co. v. Butchers' Union Live-Stock, Larding & Slaughterhouse Co., 12 Fed. 225.

fense in equity can be asserted by plea; as, for instance, where a defense consists of a great variety of circumstances, the effect of allowing a plea would be that the court would give judgment on the circumstances of the case before they were made out by proof.[1] In accordance with its object, a plea must reduce the case, or that part to which it is directed, to a single point, the determination of which may bar the suit at that stage, or allow the complainant to proceed.[2] The nature, structure, and office of pleas is hereafter considered at length.

As a plea prays judgment whether any other answer than the plea contains shall be made, a subsequent answer, which is the most full and complete defense to the merits, will overrule or waive the plea.[3]

THE ANSWER.

54. If the defendant does not or cannot oppose the bill by disclaimer, demurrer, or plea, or has so opposed only a part of it, he must generally present his defense to the whole bill, or to such part as has not been already objected to, by answer.

55. The answer is the last formal pleading of the defendant in the suit, and must set up a valid defense to all the allegations of the bill not covered by demurrer, plea, or disclaimer, as well as a direct and full reply to all interrogatories or charges which the bill may contain. It must always be a statement of fact, and not of argument.

If the defendant is unable to defend himself from the charges in the bill, either wholly or partially, by any of the modes of defense previously mentioned, he must answer the whole, or such part as has not already been opposed by disclaimer, demurrer, or plea, by the formal presentment of facts constituting a defense to the merits of the bill,[1] which, as we shall hereafter see, must be positively,

§§ 52–53. [1] See post, c. 7. [2] See post, c. 7.

[3] Post, c. 7. See, also, Eq. Rule 37; Lewis v. Baird, 3 McLean, 56, Fed. Cas. No. 8,316; Ferguson v. O'Harra, Pet. C. C. 493, Fed. Cas. No. 4,740.

§§ 54–55. [1] Com. Dig. tit. "Chancery," 1; Story, Eq. Pl. (10th Ed.) § 846.

precisely, and fully alleged, and must be a statement of facts only, not of argument or inference.[2] The complainant has a right, in general, to be informed by the answer of the nature of the defense set up, and this right is not confined to the points as to which the defendant intends to offer evidence; but he may insist, even when the facts are uncontroverted, upon having notice upon the record, in a precise and unambiguous manner, of the nature of the conclusions to be drawn from them.[3] The complainant may require the discovery he seeks, either because he cannot prove the facts, or in aid of such proof as he may have, or to avoid expense. When the respondent is not protected by either disclaimer, demurrer, or plea, he must therefore answer, and his answer must, in general, be full and complete as to all the charges in the bill not so covered.[4]

The rule just stated is subject to certain exceptions, based upon grounds of policy or necessity, which will be hereafter noticed,[5] and to the limitations that the answer as a defense must be confined to matters alleged in the bill, and cannot go outside of it, and that although answers to matters not material to the complainant's case may, if given, aid him in establishing that which is material, yet they cannot, for that reason alone, be required.[6] The nature and office of answers in equity will be hereafter fully noticed and explained,[7] and in the present chapter we shall also notice the conditions under which, and the extent to which, it is received as evidence in the cause.[8]

Answer and Disclaimer.

The disclaimer may accompany an answer, plea, or demurrer when the defendant is in a position to assert that he has no right or interest in or to a part of the claim made by the bill, and as has

[2] See post, p. 500.

[3] 2 Bouv. Inst. 4359.

[4] Post, c. 8.

[5] Post, c. 8.

[6] This seems to be the result of the rules as to immateriality, and is certainly a necessary limitation upon the right of a complainant to compel a defendant to provide evidence by which to establish a claim against the defendant himself. See 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 570, 571, and cases cited.

[7] Post, c. 8.

[8] Post, § 75.

been seen [9] is not often used except in conjunction with an answer, as, if the defendant has been made a party by mistake, or, if he ever had any interest, the plaintiff may be entitled to a discovery as to whether that is the fact, or what the facts are, or who should be the proper party.[10]

Exceptions to Answer.

The manner in which the complainant objects to the defendant's answer is not by demurrer, but by filing exceptions to it,[11] and these may be either for insufficiency, where it is not made under oath,[12] in not being a proper answer to the bill in point of law,[13] or for the faults known as scandal and impertinence, hereafter noticed.[14] Exceptions to the sufficiency of the answer cannot be sustained, unless there is some material allegation, charge, or interrogatory contained in the bill which has not been fully answered. And where new matter, not responsive to the bill, is stated in the answer, if such new matter is wholly irrelevant, and forms no sufficient ground of defense, the complainant may except to the answer for impertinence, or may raise the objection at the hearing.[15] In form, the exceptions should be separate, concerning each part of the bill claimed to be insufficiently or improperly answered,[16]

[9] Story, Eq. Pl. §§ 838, 839; post, p. 91.

[10] See post, c. 5.

[11] Arnold v. Styles, 2 Blackf. (Ind.) 391; Ryan v. Melvin, 14 Ill. 68; Bart. Eq. p. 120 et seq.; Story, Eq. Pl. § 864; Emery v. Pickering, 13 Sim. 583; Eq. Rule 61.

[12] An answer not under oath is not evidence for the party making it, and therefore cannot be excepted to for insufficiency. See McCormick v. Chamberlin, 11 Paige (N. Y.) 543; Carpenter v. Benson, 4 Sandf. Ch. (N. Y.) 496; Board of Sup'rs of Fulton Co. v. Mississippi & W. R. Co., 21 Ill. 338, 366; Brown v. Mortgage Co., 110 Ill. 235. See, also, McClaskey v. Barr, 40 Fed. 559. An answer not under oath can only be excepted to for scandal or impertinence. Mix v. People, 116 Ill. 267, 4 N. E. 783.

[13] See Stafford v. Brown, 4 Paige (N. Y.) 88.

[14] Post, p. 502.

[15] Per Walworth, Ch., in Stafford v. Brown, 4 Paige (N. Y.) 88.

[16] 1 Daniell, Ch. Pl. & Prac. (5th Ed.) 759, 760. See Brooks v. Byam, 1 Story, 296, Fed. Cas. No. 1,947; Board of Sup'rs of Fulton Co. v. Mississippi & W. R. Co., 21 Ill. 338, 365; Stitt v. Hilton, 31 N. J. Eq. 285; Bower Barff Rustless-Iron Co. v. Wells Rustless-Iron Co., 43 Fed. 391; Stafford v. Brown, 4 Paige (N. Y.) 88.

and should at least state the substance of the allegation, charge, or interrogatory in the bill which is not fully answered, so that, by reference to the bill alone in connection with the exception, the court may see that the particular matters as to which a further answer is sought are stated in the bill, or that such answer is called for by the interrogatories.[17] Like all other formal steps in equity procedure, exceptions must be in writing,[18] and signed by counsel.[19]

THE REPLICATION.

56. If the defendant answers to the merits of the bill, and the answer is not excepted to, the complainant should file his replication, formally denying the truth and sufficiency of the answer, and affirming the truth and sufficiency of the bill.

57. The replication is the last regular pleading in an equitable suit. It is merely formal, and is only filed to the answer. It contains no statement of facts, and is now always general in its form.

If the answer or plea of the defendant controverts the facts charged in the complainant's bill, or sets forth new facts and circumstances which the complainant is not disposed to admit, he may maintain the truth of his own allegations, and deny the validity of those made by his opponent, by a replication to the answer. This formal pleading, which is hereafter fully noticed, is now but a general averment of the truth and sufficiency of the bill, and an equally general denial of the truth and sufficiency of the answer,[1]

[17] See Hodgson v. Butterfield, 2 Sim. & S. 236; Brooks v. Byam, 1 Story, 296, Fed. Cas. No. 1,947; Turnage v. Fisk, 22 Ark. 286; Baker v. Kingsland, 3 Edw. Ch. (N. Y.) 138; Stitt v. Hilton, 31 N. J. Eq. 285; Mix v. People, 116 Ill. 267, 4 N. E. 783; Arnold v. Slaughter, 36 W. Va. 589, 15 S. E. 250.

[18] 1 Daniell, Ch. Pl. & Prac. *763, citing De La Torre v. Bernales, 4 Madd. 396.

[19] Candler v. Partington, 6 Madd. 102; Yates v. Hardy, 1 Jac. 223; and see Bart. Eq. 120.

§§ 56–57. [1] Bart. Suit in Eq. 129–131; Story, Eq. Pl. (10th Ed.) §§ 877, 878; Coop. Eq. Pl. 329, 330; Mitf. Eq. Pl. 321, 322; Glenn v. Hebb, 12 Gill & J. (Md.) 271; O'Hare v. Downing, 130 Mass. 16.

and forms the last of the regular pleadings in an equitable suit.[2] Formerly, if the answer contained new facts in opposition to the allegations of the bill, it was customary for the complainant to reply by a special statement of facts not before charged, and this again might be followed by a rejoinder by the defendant, a surrejoinder by the complainant, and a rebutter and surrebutter, as at common law, so long as new facts were set forth by one party and denied by the other.[3] The expense and delay of these pleadings caused them to be abandoned, and, though we still retain the form of the special replication, its use has been entirely dispensed with,[4] and is expressly prohibited by the equity rules.[5]

The effect of a general replication to the answer is to waive all technical objections as to the form in which the defenses it contains are presented,[6] but does not cure defects in its substance,[7] nor put in issue immaterial allegations.[8] When taken to a plea, it admits its sufficiency, but denies its truth,[9] and puts in issue only the matters which the plea alleges.[10]

The necessity for a replication is waived if the parties go to trial on bill and answer without objection,[11] and so even if the case has been submitted by agreement of the parties upon bill, answer, and general replication, and no replication has been filed.[12] Leave to withdraw a replication may also be granted in a proper case and upon a sufficient showing.[13]

[2] Langd. Eq. Pl. § 53.

[3] Story, Eq. Pl. (10th Ed.) § 878; Bart. Suit in Eq. 129; Coop. Eq. Pl. 329, 330; Mitf. Eq. Pl. 321, 322.

[4] Story, Eq. Pl. (10th Ed.) § 878; Bart. Suit in Eq. 129.

[5] Eq. Rule 45.

[6] McKim v. Mason, 2 Md. Ch. 510. See, also, Slater v. Maxwell, 6 Wall. 268; Boyd v. Hawkins, 2 Dev. Eq. (N. C.) 195.

[7] Everts v. Agnes, 4 Wis. 343.

[8] Candee v. Lord, 2 N. Y. 269.

[9] Hughes v. Blake, 6 Wheat. 453. See, also, Tompkins v. Anthon, 4 Sandf. Ch. (N. Y.) 97; Beals v. Railroad Co., 133 U. S. 290, 10 Sup. Ct. 314.

[10] Tompkins v. Anthon, 4 Sandf. Ch. (N. Y.) 97.

[11] Corbus v. Teed, 69 Ill. 206.

[12] Glenn v. Hebb, 12 Gill & J. (Md.) 271; Sneed v. Town, 9 Ark. 535.

[13] See Brown v. Ricketts, 2 Johns. Ch. (N. Y.) 425.

INTERLOCUTORY PROCEEDINGS.

58. The various steps between the commencement and termination of an equity suit are termed interlocutory proceedings.

In the course of the suit either party may be allowed to amend his pleadings, when not under oath; or a receiver may be appointed to take charge of property affected; or money admitted to be due may be ordered to be paid into court; or the cause, or questions arising in connection therewith, may be referred to a master for an investigation and report.

The court may also, for the settlement of intricate questions of fact, direct issues of fact, called "feigned issues," to be submitted to a jury for trial; or it may issue its process of injunction to compel a necessary act, or to prevent a threatened wrong or injury or remedy an injury already done; or it may, upon a proper application, and in some cases of its own motion, and for a full and proper submission of the issues involved, order the production of documents or writings relevant to the controversy; and any person, not a party to the record, may apply, at a proper stage of a pending suit, for leave to intervene and be made a party thereto.

AMENDMENT.

59. Either party will generally be allowed to correct inaccuracies or supply omissions in his pleadings at any time before the testimony is taken, if guilty of no laches; and the court, at the hearing, or even after and before final decree, may permit amendments in special cases, or allow the pleadings to be made conformable to the case actually heard; but neither party will be allowed to introduce, by amendment, a case or defense different from that originally presented, and a sworn answer or plea cannot generally be amended, except as to merely formal defects, except upon a clear showing of misstate-

ment or omission through fraud, accident, or mistake. Formal defects may generally be corrected at any time before final decree.

Great liberality is shown by courts of equity in the allowance of amendments, though in the case of answers under oath, as we shall see, they act with great caution in permitting any change whatever beyond the correction of merely formal defects.[1] Defects of this character, such as the omission or misstatement of names or dates, may be corrected in any pleading at any time before final decree,[2] and the complainant may amend his bill, subject to the limitation hereafter mentioned, in matters of substance and as of course,—that is, without application to the court,—at any time before answer filed.[3] As a general rule, and aside from sworn

§§ 58–59. [1] Verplank v. Insurance Co., 1 Edw. Ch. (N. Y.) 46.

[2] To the bringing in of an essential party, see Walden v. Bodley, 14 Pet. 156; Shields v. Barrow, 17 How. 130; Harrison v. Rowan, 4 Wash. C. C. 202, Fed. Cas. No. 6,143; or the averment of citizenship, see Fisher v. Rutherford, Baldw. 188, Fed. Cas. No. 4,823; Hilliard v. Brevoort, 4 McLean, 24, 25, Fed. Cas. No. 6,505.

[3] Under equity rule 28, the bill may be amended as of course, and without costs in any manner whatever, before a copy is taken from the clerk's office, and in any small matters afterwards, such as inserting or correcting dates, filling blanks, etc.; but if it is amended in any material point after a copy has been taken, and before answer, plea, or demurrer (as he may do of course), he must pay to the defendant the costs occasioned thereby, and furnish him a copy of the amendment, with suitable reference to the place where the same is to be inserted in the bill. If the amendments are numerous, a copy of the active bill as amended must be furnished, and, if there is more than one defendant, a copy must be furnished to each one affected by the amendment. Equity rule 29 provides for amendment under order of court after demurrer, plea, or answer has been put in, and before replication, either with or without payment of costs, as the court shall order, and also authorizes amendments after replication filed (the latter being then withdrawn) by special order of court, upon motion or petition, and proof by affidavit that the application is not made for the purpose of vexation or delay, etc., notice being given to the defendant, and upon the plaintiff submitting to such terms or orders as the court shall impose or make. See, under the last-mentioned rule, Wharton v. Lowrey, 2 Dall. 364, Fed. Cas. No. 17,481; Ross v. Carpenter, 6 McLean, 382, Fed. Cas. No. 12,072; Clifford v. Coleman, 13 Blatchf. 210, Fed. Cas. No. 2,894; Washington R. R. v. Bradleys, 10 Wall. 299. A bill

answers, both parties will be allowed to amend their pleadings at any time before issue joined, or, perhaps, after issue joined and before the taking and publication of the testimony,[4] always provided that the party has not been guilty of laches, and subject to the further rule that no amendment will be allowed to present a case or defense different from that originally stated.[5] After the examination of witnesses it is generally too late to apply for leave to amend, though it seems that, in cases of special necessity, where the showing is clear and undoubted, the court may allow an amendment;[6] and it seems that there is thus practically no time when the power may not be exercised, if the necessity plainly appears and the ends of justice are to be subserved.[7] The court may thus

and its amendments constitute but one record, and the answers thereto but one. Munch v. Shabel, 37 Mich. 166.

[4] See Thorn v. Germand, 4 Johns. Ch. (N. Y.) 363. Mere formal amendments may be made at any stage of the cause; but those which change the character of the bill or answer, so as to make substantially a new case, should rarely be admitted after the cause is set for hearing, much less after it has been heard. Walden v. Bodley, 14 Pet. 156; Evans v. Bolling, 5 Ala. 550. See, also, Boyd v. Clements, 8 Ga. 522; Moshier v. Knox College, 32 Ill. 155; McDougald v. Dougherty, 11 Ga. 570.

[5] Snead v. McCoull, 12 How. 407; Howe v. Russell, 36 Me. 115; Shields v. Barrow, 17 How. 130; Goodyear v. Bourn, 3 Blatchf. 266, Fed. Cas. No. 5,561; Larkins v. Biddle, 21 Ala. 252; Rogers v. Atkinson, 14 Ga. 320. So an amendment which would render a bill multifarious. Jordan v. Jordan, 16 Ga. 446. See, also, Dodd v. Astor, 2 Barb. Ch. (N. Y.) 395. In an application to amend the defendant's pleading, the proposed amendments should be set out. Freeman v. Bank, Har. (Mich.) 311. A bill defective in its averments will not be amended where the case is essentially defective on the proofs, but may be dismissed without prejudice. Curtis v. Goodenow, 24 Mich. 18. It is matter of discretion with the court whether an amendment of an answer to a cross bill shall be allowed. Higgins v. Curtiss, 82 Ill. 28.

[6] See Thorn v. Germand, 4 Johns. Ch. (N. Y.) 363; Bowen v. Idley, 6 Paige (N. Y.) 46. It is not a matter of course to allow the filing of an amended bill after a cause has been at issue and testimony taken. A special application should be made to the court with a full statement of the facts intended to be incorporated in the amended bill, so that the court can judge of the propriety of giving leave. Hammond v. Place, Har. (Mich.) 438. The court may permit an amendment of the answer, even after the evidence has been heard. Scott v. Harris, 113 Ill. 447.

[7] See Martin v. Eversal, 36 Ill. 222; Boyd v. Clements, 8 Ga. 522; Peacock v. Terry, 9 Ga. 137. If the proposed amendment, when offered as late as

allow an amendment of the pleadings after final hearing, to make the record conform to the case actually heard,[8] and also to correct formal defects,[9] but the case must be an urgent and proper one, as the rule that substantial amendments must be made before the testimony is taken is generally observed.

Where pleas or answers are sworn to, a more strict rule is enforced,[10] courts of equity being exceedingly reluctant to allow any amendment in matters of substance, for the reason that the contrary practice might encourage negligence, indifference, or inattention to the duties imposed by law upon those who make statements under oath.[11] On this ground it is required that the reasons assigned for the application to amend be cogent and satisfactory;

the hearing, occasions surprise to the adverse party, it will not ordinarily be allowed. Moshier v. Knox College, 32 Ill. 155. Nor can an amended answer be filed making an entirely new case, and after a lapse of seven years from the time of filing the original answer, where the facts proposed to be thus set forth would probably, by the exercise of reasonable diligence, have been discovered in proper time. Goodwin v. McGehee, 15 Ala. 232. Amendments to a bill to meet matters set up in the answer may be allowed at, or even after, a hearing on the pleadings and proofs. Munch v. Shabel, 37 Mich. 166. Amendments not affecting the issue or prejudicing the rights of the defendant may be made at the hearing. Chancery rule 21 has no application to such a case. Goodenow v. Curtis, 18 Mich. 298. And the court is liberal in the allowance of amendments in the furtherance of justice, imposing terms when necessary. Marble v. Bonhotel, 35 Ill. 240. An amendment may thus be allowed where no undue advantage will be obtained over the opposite party, upon payment of the costs thereby occasioned. Booth v. Wiley, 102 Ill. 84.

[8] Clark v. Society, 46 N. H. 272.

[9] See Donnelly v. Ewart, 3 Rich. Eq. (S. C.) 18; Walden v. Bodley, 14 Pet. 156.

[10] The fact that a bill is sworn to does not deprive the complainant of the benefit of an amendment, in order to simplify his statement or state additional facts. Marble v. Bonhotel, 35 Ill. 240. No amendments can be made to a sworn bill except such as are merely in addition to the original bill, and consistent therewith, and they must be made by introducing a supplemental statement and without striking out any part of the bill. Verplank v. Insurance Co., 1 Edw. Ch. (N. Y.) 46.

[11] Story, Eq. Pl. § 896. See Smith v. Babcock, 3 Sumn. 583, Fed. Cas. No. 13,008, and Eq. Rule 60; Huffman v. Hummer, 17 N. J. Eq. 269; Martin v. Atkinson, 5 Ga. 390.

that the mistakes to be corrected, or the facts to be added, be made highly probable, if not certain; that they be material to the merits of the controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was sworn to and filed.[12] The rule as summed up from the authorities seems to be that a sworn answer or plea cannot generally be amended, except as to merely formal defects, such as the insertion or correction of a date, or filling in a blank, except upon a clear showing of misstatement or omission through fraud, accident, or mistake,[13] and not later than at the hearing.[14] As a general proposition, matters properly the subject of amendment to either bill or answer, which cannot be presented until after issue joined, must be made the subject of a supplemental bill or further answer.[15]

There must be no unreasonable delay in asking leave to amend, and, as a general rule, it must affirmatively appear that the matters sought to be introduced by way of amendment were not known to the party at the time his original pleading was filed.[16] If such knowledge existed, a sufficient excuse must be presented for the failure to embody such matters in the original pleading.[17]

Again, it would be foreign to the theory upon which amendments are allowed if a party was permitted, under the guise of an amend-

[12] See Story, Eq. Pl. §§ 894–902, and the opinion of the court in Smith v. Babcock, 3 Sumn. 583, Fed. Cas. No. 13,008.

[13] Story, Eq. Pl. § 896; Mitf. Eq. Pl. 324–327.

[14] The sixtieth equity rule provides that after a replication is filed, or the cause is set down for hearing on bill and answer, no amendment in any material matter shall be allowed unless upon special leave of court upon cause shown and after notice to the adverse party, and supported, if required, by affidavit. See Caster v. Wood, Baldw. 289, Fed. Cas. No. 2,505; Calloway v. Dobson, Brock. 119, Fed. Cas. No. 2,325; State of Rhode Island v. State of Massachusetts, 13 Pet. 23; Smith v. Babcock, 3 Sumn. 583, Fed. Cas. No. 13,008; Gier v. Gregg, 4 McLean, 202, Fed. Cas. No. 5,406.

[15] As to the exceptions to this rule, see Story, Eq. Pl. § 885, and instances mentioned. See, also, section 886 and note 2; Kennedy v. State Bank, 8 How. 586, 610; Eq. Rules 28–30, 57, 60.

[16] See Whitmarsh v. Campbell, 2 Paige (N. Y.) 67; Smith v. Babcock, 3 Sumn. 583, Fed. Cas. No. 13,008; Matthews v. Dunbar, 3 W. Va. 138.

[17] Whitmarsh v. Campbell, 2 Paige (N. Y.) 67.

ment, to present a new case or a new defense in place of that originally made, and any such departure is therefore prohibited, matters for amendment being restricted to those which amplify and support the original charge or defense. An examination of the cases cited below will serve to show the application of this rule.[18]

Finally, it may be said that new matters or parties, arising or being discovered since the filing of an original bill or answer, are not generally proper subjects of amendment, and must be presented by supplemental bill or further answer, as will be fully shown hereafter.[19]

RECEIVERS.

60. A "receiver" is a person appointed by a court of equity to take possession of and preserve the fund or property in litigation, to receive the rents and profits therefrom, and to protect and preserve all from loss, waste, or destruction, pending the suit. He is an officer of the court appointing him, and subject to its direction and control, and will generally be appointed only when it appears inequitable to the court for the property in question to be left under the control of either party.

The appointment of receivers in suits in equity is one of the discretionary powers of the court, and its limitations are therefore

[18] As to the bill, see Snead v. McCoull, 12 How. 407; Goodyear v. Bourn, 3 Blatchf. 266, Fed. Cas. No. 5,561; Larkins v. Biddle, 21 Ala. 252; Rogers v. Atkinson, 14 Ga. 320; Darling v. Roarty, 5 Gray (Mass.) 71; Curtis v. Leavitt, 11 Paige (N. Y.) 386; Jones v. Davenport, 45 N. J. Eq. 77, 17 Atl. 570; Seborn v. Beckwith, 30 W. Va. 774, 5 S. E. 450; Marshall v. Olds, 86 Ala. 296, 5 South. 506; Ward v. Patton, 75 Ala. 207; Miles v. Strong, 60 Conn. 393, 22 Atl. 959. See, also, Codington v. Mott, 14 N. J. Eq. 430; Walden v. Bodley, 14 Pet. 156. Cf. Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771; Bolman v. Lohman, 74 Ala. 507; Fearey v. Hayes, 44 N. J. Eq. 425, 15 Atl. 592. As to the answer, see Goodwin v. McGehee, 15 Ala. 232; Howe v. Russell, 36 Me. 115; Pinkston v. Taliaferro, 9 Ala. 547.

[19] Post, p. 293. Facts which have transpired subsequent to the filing of the bill cannot be set forth by way of amendment. Hammond v. Place, 1 Har. (Mich.) 438.

not easy to define. It will generally be exercised where it is necessary to secure or protect tangible property involved in the particular controversy from injury, waste, or destruction, during the pendency of the suit, and to preserve it for its appropriate uses and ends as determined by the decision of the controversy, when it appears to the court that it is inequitable or improper for it to be left in the custody or under the control of the parties on either side.[1] Thus, where property in the hands of a trustee for a particular purpose is in danger of being diverted to some other;[2] or where there are conflicting legal and equitable debts against an estate, and it is necessary to preserve the property, as well as its rents and profits, for the benefit of those whose rights may be established;[3] or where a partnership is dissolved by one or more of the partners having power to dissolve it, and there is no provision in the partnership articles or agreement for a settlement,[4]— a court of equity may, upon the application of an interested party and for the benefit of all parties in interest, appoint some disinterested person to take charge of the property in question, to collect its rents and profits, if any, and, generally, to preserve and protect it from loss or injury until the litigation of which it is the subject-matter has been completed and the court disposes of it by the decree.[5] Many other instances might be mentioned where this power

§ 60. [1] See Lenox v. Notrebe, Hemp. 225, Fed. Cas. No. 8,246b; Ex parte Walker, 25 Ala. 81; Bailey v. Bailey (Ky.) 10 S. W. 660. The appointment will depend upon a proper statement of the necessary facts in the bill. Tomlinson v. Ward, 2 Conn. 396.

[2] See Janeway v. Green, 16 Abb. Prac. (N. Y.) 215, note. And so when the parent of an infant, in possession of the infant's property, is squandering it. Butler v. Freeman, Amb. 301, 302.

[3] Fetter, Eq. § 203; Chase's Case, 1 Bland (Md.) 206, 213; Blondheim v. Moore, 11 Md. 365.

[4] See Law v. Ford, 2 Paige (N. Y.) 310; McElvey v. Lewis, 76 N. Y. 373; Jordan v. Miller, 75 Va. 442; New v. Wright, 44 Miss. 202; Marten v. Van Schaick, 4 Paige (N. Y.) 479; Taylor v. Neate, 39 Ch. Div. 538; Irwin v. Everson, 95 Ala. 64, 10 South. 320; Bliley v. Taylor, 86 Ga. 163, 13 S. E. 283.

[5] "Where a partnership is alleged on the one side and denied on the other, and a motion is made for a receiver, the court, if it directs an issue as to partnership or no partnership, usually declines to appoint a receiver until that question is determined." George, Partn. p. 361; Kerr, Rec. p. 98; Peacock v. Peacock, 16 Ves. 49; Chapman v. Beach, 1 Jac. & W. 594, note; Fairburn

will be exercised, and, generally, receivers may be appointed, under proper circumstances, to take charge of any property which the court can dispose of by its decree.[6]

The appointment of a receiver is, as has been noted, a matter within the discretionary powers of a court of equity, but this power will not be exercised unless for sufficient reason,[7] and then only for the benefit of the parties to the suit, or of those who may establish rights in the particular controversy.[8] To obtain the appointment, there must ordinarily be a suit already pending,[9] or, at the least, one must be commenced at the same time, and the application may be made immediately upon its commencement, or at any time during its progress, even after a final decree,[10] though, as

v. Pearson, 2 Macn. & G. 144; Norway v. Rowe, 19 Ves. 144; Baxter v. Buchanan, 3 Brewst. (Pa.) 435; Hobart v. Ballard, 31 Iowa, 521; Guyton v. Flack, 7 Md. 398; Speights v. Peters, 9 Gill (Md.) 472. A receiver will not be appointed in a proceeding to dissolve a partnership where the partnership is denied, unless the court is satisfied that there is in fact a partnership between the parties, or that the fund is in danger. McCarty v. Stanwix, 16 Misc. Rep. 132, 38 N. Y. Supp. 820.

[6] See King v. King, 6 Ves. 172; Jordan v. Miller, 75 Va. 442; Allen v. Hawley, 6 Fla. 142, 164; Katz v. Brewington, 71 Md. 70, 20 Atl. 139; Word v. Word, 90 Ala. 81, 7 South. 412; Parker v. Parker, 82 N. C. 165; Price's Ex'x v. Price's Ex'rs, 23 N. J. Eq. 428; Hagenbeck v. Arena Co., 59 Fed. 14; Hollenbeck v. Donnell, 94 N. Y. 342; Mercantile Trust Co. of New York v. Missouri, K. & T. Ry. Co., 36 Fed. 221; Folger v. Insurance Co., 99 Mass. 267.

[7] Thus, the court will not interfere on an application to have a receiver appointed for a trust estate while chancery proceedings are pending for the removal of the trustees, unless a strong case is made out. Poythress v. Poythress, 16 Ga. 406. Nor will it appoint a receiver against the legal title unless there is imminent danger to the property and the intermediate rents and profits. Kipp v. Hanna, 2 Bland (Md.) 26. See, also, Willis v. Corlies, 2 Edw. Ch. (N. Y.) 281; Oil Co. v. Petroleum Co., 6 Phila. (Pa.) 521; Cheever v. Railroad Co., 39 Vt. 653.

[8] Ellicott v. Insurance Co., 7 Gill (Md.) 307; Ellicott v. Warford, 4 Md. 80. A receiver is appointed to subserve the interests of all persons interested in the subject-matter committed to his care. First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 60 Mich. 487, 27 N. W. 657.

[9] Daniell, Ch. Pl. & Prac. (6th Am. Ed.) pp. 1733, 1734. The same authority lays it down that a receiver of an infant's property may be appointed without a suit first brought (pages 1351–1354), and states that the usual practice is to appoint a guardian.

[10] After a decree in an action to subject property fraudulently conveyed,

a matter of practice, a receiver will not generally be appointed before the answer of the defendant is filed, unless it is made manifest to the court that the property involved in the particular suit is in actual danger of loss or injury.[11] The application is generally made upon the bill, either alone or supported by affidavits, by motion addressed to the discretion of the court, and generally upon notice to the opposing party.[12] Ex parte applications will only be granted in cases of urgent necessity,[13] though want of notice is cured if counsel for the opposite party are present in court.[14]

When appointed, a receiver is an officer of the court appointing him, and is subject to its control, direction, and protection, and therefore cannot generally take any material step regarding the property in his care[15] and custody, or sue or be sued regarding it,[16] without the leave of that court first obtained.[17] The appointment of receivers is now largely a matter of statutory regulation, and the laws of the different states should be consulted for detailed information.

a receiver may be appointed, though not prayed in the bill, if the circumstances justify it. Shannon v. Hanks, 88 Va. 338, 13 S. E. 437.

[11] West v. Swan, 3 Edw. Ch. (N. Y.) 420.

[12] Nusbaum v. Stein, 12 Md. 315; Tibbals v. Sargeant, 14 N. J. Eq. 449. A receiver may be appointed at the hearing, though not specially prayed for in the bill. Clyburn v. Reynolds, 31 S. C. 91, 9 S. E. 973.

[13] See Triebert v. Burgess, 11 Md. 452, 461; Voshell v. Hynson, 26 Md. 83; Sandford v. Sinclair, 8 Paige (N. Y.) 373; Hungerford v. Cushing, 8 Wis. 320.

[14] McLean v. Bank, 3 McLean, 503, Fed. Cas. No. 8,887. That a receiver was appointed without notice to the adverse party is immaterial where the question of the propriety of such appointment has been heard, and both parties have had ample opportunity to be heard. Elwood v. Bank, 41 Kan. 475, 21 Pac. 673.

[15] Field v. Jones, 11 Ga. 413; Merritt v. Lyon, 16 Wend. (N. Y.) 405.

[16] Merritt v. Lyon, 16 Wend. (N. Y.) 405; In re Merritt, 5 Paige (N. Y.) 125; Taylor v. Baldwin, 14 Abb. Prac. (N. Y.) 166; Jones v. Browse, 32 W. Va. 444, 9 S. E. 873. As to where a receiver appointed by the courts of the United States may be sued without leave, see Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139.

[17] A receiver is the agent of all parties interested in the fund, not of the complainant only. Green v. Bostwick, 1 Sandf. Ch. (N. Y.) 185. See First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 60 Mich. 487, 27 N. W. 657.

PAYMENT OF MONEY INTO COURT.

61. In many cases, where it is admitted by the pleadings or is otherwise shown that a definite sum of money is due and owing from one of the parties to the suit, the court may order the same paid into court to abide the final decree.

In addition to the appointment of receivers, courts of equity provide for the preservation of property in dispute pending the litigation, by ordering money or choses in action to be paid into or deposited in court, before the hearing or before final decree, when it is admitted by the pleadings, or otherwise established by the proceedings, that a certain sum is due the complainant from a defendant, as where it is held in trust by the latter, or, as in the most common class of cases, where personal representatives, trustees, or any persons who, by reason of their situation, fill the character of the latter,[1] are in the actual possession of money or choses in action, in which they have no equitable interest, and to which the complainant may be entitled.[2] Thus, where several parties claim a sum of money, to which the party in possession does not assert any right, the court may order such sum to be paid into the hands of its clerk until the respective rights of all the claimants have been determined;[3] or, where an accounting and the enforcement of a trust is sought against trustees, the balance of money, stocks, or other securities may be ordered deposited in court, to be reinvested, if necessary, and to abide the event of the suit;[4] or where the com-

§ 61. [1] As to when payment into court will be ordered against a respondent, see 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1770–1772; McKim v. Thompson, 1 Bland (Md.) 156.

[2] See 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) § 1770 et seq.; 1 Beach. Mod. Eq. Prac. §§ 603, 604; Harris v. Hess, 10 Fed. 263; Lackett v. Rumbaugh, 45 Fed. 23, 27; Cass v. Higenbotam, 100 N. Y. 248, 3 N. E. 189; Palmer v. Truby, 136 Pa. St. 556, 20 Atl. 516; Tuck v. Manning, 150 Mass. 211, 22 N. E. 1001; Stevens v. Nisbet, 88 Ga. 456, 14 S. E. 711; Park v. Wiley, 67 Ala. 310; Clarkson v. De Peyster, 1 Hopk. Ch. (N. Y.) 274; Hosack v. Rogers, 6 Paige (N. Y.) 415; Haggerty v. Duane, 1 Paige (N. Y.) 321.

[3] In re Succession of Thompson, 14 La. Ann. 810.

[4] Danby v. Danby, 5 Jur. (N. S.) 54. See, also, Clarkson v. De Peyster, 1 Hopk. Ch. (N. Y.) 274; Hosack v. Rogers, 6 Paige (N. Y.) 415.

plainant in his bill, or the defendant in his answer, clearly admits a definite sum to be due, either may be ordered to pay it into court without waiting for the final decree. The method of obtaining the order of court for the purpose in question is regulated by rules of court, but, generally speaking, is by an interlocutory application or motion, and, to obtain such order against a defendant, the fact and extent of the liability must have been established either by a plain admission or by an account or interlocutory decree,[5] and it must also appear that the person applying for the order has some interest in the money or in its final disposition, that he who has it has no equitable title thereto, and that the facts supporting the application are admitted or proved in court so as to be beyond further controversy.[6] It is also necessary that the sum due should be definitely fixed,[7] though it seems sufficient if it can be ascertained by deducting items in dispute.[8] A voluntary payment into court, except, perhaps, in some cases, renders the clerk only the private agent of the parties;[9] but a payment under an order of court, though, until the rights of the parties are adjudicated, it does not affect them, operates, after an adjudication, as a payment to the party whom the court finds entitled to it.[10]

REFERENCE TO A MASTER.

62. Wherever it is necessary, in the progress of a cause, to take an account, or to investigate the title of persons to property affected by the suit, or to make any other inquiries necessary to properly inform the court so that it may be in a position to determine and adjust the rights of the parties in interest; or where some special ministerial act is to be done, as to sell property; and in other similar cases,—the

[5] See McTighe v. Wadleigh, 22 N. J. Eq. 81.

[6] McKim v. Thompson, 1 Bland (Md.) 150.

[7] See Schwarz v. Sears, Har. (Mich.) 440.

[8] Union Mut. Life Ins. Co. v. Kellogg, 5 Wkly. Notes Cas. 477, 5 Reporter, 685, Fed. Cas. No. 14,373.

[9] Mazyck v. McEwen, 2 Bailey (S. C.) 28.

[10] See Henderson v. Moss, 82 Tex. 69, 18 S. W. 555.

court will refer the particular matter to a master in chancery, who is an officer of the court, and whose duty it is to thereupon comply with the order of the court, and report to the court the facts of such compliance.

During the progress of the suit, questions of fact may often arise by reason of which the court is unable to grant the relief sought by the complainant without some preliminary information, as where detailed matters of fact are to be settled, or accounts taken and stated, or testimony taken and reported, or damages ascertained, and in many like instances. So it may also be necessary to sell property, or to perform some other special ministerial act. In all such cases, the court usually refers the matter in question to a master in chancery, either already a standing officer of the court, or appointed pro hac vice, by an order which directs him to investigate or ascertain the state of the matter, or perform the act, in question, and make his report thereupon to the court.[1] The cases in which such a reference may be made are more numerous than those mentioned, but the latter are sufficient for illustration, the subject being one requiring much more space to discuss it as its importance demands than can be given here. The reference is made by the court upon application of one of the parties to the suit, or by the court of its own motion, and for its own convenience, but it cannot extend to a transfer of the whole case for hearing and decision except by consent of all parties;[2] nor to a matter not put in issue by the pleadings. In the performance of his duties, the master follows the settled practice of the court appointing him, and generally has power to control the proceedings of parties before him, to examine witnesses under oath, and, if a party fails to attend before him after reasonable notice, may proceed without such party without his report being open to objection as being ex parte.[3] His authority in the particular case is generally defined

§ 62. [1] See 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) c. 29; Simmons v. Jacobs, 52 Me. 147, 153; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355. And see Eq. Rule 82, as to the appointment of masters by the United States circuit courts.

[2] See Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355.

[3] Eq. Rule 75.

by the decree or decretal order referring the matter to him, but the method of procedure in the examination of such matter may be regulated by him according to circumstances.[4] The report of the master is his certificate to the court of the performance of the duty imposed, and, in the federal courts at least, where it embodies findings upon the facts presented before him, is not conclusive, but advisory only, to be accepted and acted upon or disregarded by the court, according to its own judgment as to the weight of the evidence.[5] As a matter of practice, however, it is not usual for the court to disregard the report unless exceptions are taken and brought before it for examination, and, upon such examination, sustained. These exceptions are the method of objecting to the sufficiency or validity of the report, and are generally filed by any party who is dissatisfied, after the report has been filed, though according to the strict chancery practice they must be first taken before the master or the court will not hear them.[6] If exceptions are sustained, the report may be modified, or set aside, or the matter may be referred back to the master to be framed in accordance with the ruling of the court upon the exceptions.[7]

The office of master in chancery is still well known in the federal courts, and exists in some of the states, and is of ancient origin, dating back to the time when chancery jurisdiction was first established. Masters were appointed by the king, as the assistants

[4] See Eq. Rule 77; Simmons v. Jacobs, 52 Me. 147.

[5] See Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355; Crawford v. Neal, 144 U. S. 585, 12 Sup. Ct. 759.

[6] See Fischer v. Hayes, 16 Fed. 469; Troy Iron & Nail Factory v. Corning, 6 Blatchf. 328, Fed. Cas. No. 14,196. This rule of practice, however, does not seem to have been universally adopted, and where the condition indicated in the text is not observed, exceptions taken before the court are sufficient if in due time and form, without regard to whether they have been first taken before the master or not. This is the case in the United States circuit court for the district of Minnesota, and it has not thus far been held necessary for the master to serve his draft report in order to afford an opportunity for exceptions before him. See, on this point, Hatch v. Railroad Co., 9 Fed. 856; Fidelity Insurance & Safe-Deposit Co. v. Shenandoah Iron Co., 42 Fed. 372.

[7] See The Menominie, 36 Fed. 197, 205. As to correction without a re-reference, see Parks v. Booth, 102 U. S. 96, 106; Witters v. Sowles, 43 Fed. 405.

or clerks of the chancellor, and, in early times, had important duties to perform in connection with the common law, in hearing and examining the complaints of those who sought redress in the king's court, and furnishing them with appropriate writs, and were also ex officio members of the king's select council. The importance of the office increased with the growth of chancery jurisdiction, and, though suffering a diminution during the reign of Elizabeth, was fully recognized thereafter, and the office continued to be a well-used branch of the English court of chancery down to the time of its displacement by the present method.[8] The matters properly referable to a master have generally continued the same as at the present day, though formerly more numerous, and he has always acted, as at present, as an assistant to the court. In states where the office exists, the master is generally appointed by the governor, and in federal practice, by the court.[9] The office of master, while in some respects analogous to that of the sheriff of a court of law,[10] is more in the nature of that of referee, in respect to the more important duties to be performed.

FEIGNED ISSUES.

63. Where, in the progress of the suit, questions of fact arise which are of such an intricate nature, or which are so closely contested, that the court cannot satisfactorily determine them, it may direct or frame issues of fact upon such questions to be tried by a jury. The verdict rendered upon such trial is not conclusive, however, but advisory only, though the

[8] The student will find a very full account of the origin and progress of the office of master in chancery in the first volume of Spence's Equitable Jurisdiction of the Court of Chancery.

[9] Eq. Rule 82 provides that the United States circuit court may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and may also appoint a master pro hac vice in any particular case. See Van Hook v. Pendleton, 2 Blatchf. 85, Fed. Cas. No. 16,852.

[10] Houseal v. Gibbes, 1 Bailey, Eq. (S. C.) 482.

court may accept it as the foundation for a decree. Issues may be thus awarded upon the application of either party, or by the court of its own motion, the exercise of the power being discretionary.

While a court of equity may decide all questions of fact as well as of law which arise during the progress of the suit, where the evidence is conflicting or unsatisfactory, or the court is doubtful as to the nature of the proof offered, it is within its discretion to cause issues of fact to be framed and tried by a jury.[1] Thus, if a bill charges fraud, and the evidence is conflicting and unsatisfactory, an issue may be directed.[2] So it has been awarded to ascertain the value of the rents and profits of land in controversy,[3] or the amount due upon a lost note,[4] or to determine the genuineness of written instruments when that fact was in issue, or to settle disputed boundaries or the title to land,[5] or to ascertain the amount of unliquidated damages,[6] to dispose of questions as to the sanity or mental capacity of parties,[7] and in suits to determine the validity of wills.[8]

The awarding of an issue in an equity suit rests in the sound discretion of the court, except where the right of trial by jury is preserved in all cases, as it is in some of the states.[9] Strictly

§ 63. [1] See 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1071–1080, and cases cited. As to when, according to the practice of chancery, an issue will be directed, see Townsend v. Graves, 3 Paige (N. Y.) 453. See, also, Tappan v. Evans, 11 N. H. 331. And for instances in which this course has been followed, see the following: Pomeroy v. Winship, 12 Mass. 514; Dodge v. Griswold, 12 N. H. 573; Cocke v. Upshaw, 6 Munf. (Va.) 464; Moore v. Martin, 1 B. Mon. (Ky.) 97.

[2] Hooe v. Marquess, 4 Call (Va.) 416.

[3] Eustace v. Gaskins, 1 Wash. (Va.) 188.

[4] Truly v. Lane, 7 Smedes & M. (Miss.) 325.

[5] Fox v. Ford, 5 Rich. Eq. (S. C.) 349. See Santee River Cypress Lumber Co. v. James, 50 Fed. 360.

[6] Isler v. Grove, 8 Grat. (Va.) 257.

[7] Banks v. Booth, 6 Munf. (Va.) 385. See, also, Howard v. Howard, 87 Ky. 616, 9 S. W. 411.

[8] Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460, 492, 493.

[9] An issue out of chancery should not be awarded where the complainant fails to uphold the case made in his bill by competent and sufficient evidence,

speaking, a jury in an equity cause cannot be constitutionally demanded by either party, and this still appears to be the rule in the federal courts as to all cases strictly within their equity jurisdiction, as the latter is defined by the constitution and Revised Statutes.[10] Where a claim is properly cognizable at law, but also includes a demand for equitable relief, the right to a jury trial is still preserved. But while the power is thus a discretionary one, it is used with caution, and there must be something more than a mere contradiction in the testimony.[11]

When a party is entitled to have issues of fact awarded, the application must be made in due season, or it will be waived. The rule has been laid down, generally, that it is improper to direct an issue until after the pleadings are closed and the testimony taken and published;[12] but there seems no reason, upon principle, why the power may not be exercised where the pleadings alone, when complete, disclose a proper case. The usual time for applying to have issues framed appears, according to the decisions, to be at the hearing; and the power, being discretionary, may be exercised by the court of its own motion. When applied for, it may be by any of the parties before the court.[13] When awarded, the form of

though answer under oath be waived; the answer in such case being equivalent to a traverse. Jones v. Christian, 86 Va. 1017, 11 S. E. 984.

[10] See Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712; Killian v. Ebbinghaus, 110 U. S. 568, 573, 4 Sup. Ct. 232; Whitehead v. Entwhistle, 27 Fed. 778; Kennedy v. Kennedy, 2 Ala. 571; Johnston v. Hainesworth, 6 Ala. 443; Van Hook v. Pendleton, 1 Blatchf. 187, Fed. Cas. No. 16,851; Gamble v. Johnson, 9 Mo. 605. See, also, Sands v. Beardsley, 32 W. Va. 594, 9 S. E. 925.

[11] Goodyear v. Rubber Co., 2 Cliff. 351, Fed. Cas. No. 5,583. See, also, Herdsman v. Lewis, 20 Blatchf. 266, 9 Fed. 853. As to waiver, see Hauser v. Roth, 37 Ind. 89; American Dock & Improvement Co. v. Public School Trustees, 37 N. J. Eq. 266, 272; Parker v. Nickerson, 137 Mass. 487; Bourke v. Callanan, 160 Mass. 195, 35 N. E. 460.

[12] In New Hampshire it has been held that a motion for an issue to a court of law was premature when made before the pleadings were closed, so as to enable the court to see what facts are controverted, and to give the party entitled the benefit of the discovery which the defendant may make in his answer. Tibbetts v. Perkins, 20 N. H. 275.

[13] This is the rule in Texas, Faulk v. Faulk, 23 Tex. 653; and in New Hampshire, Holtt v. Burleigh, 18 N. H. 389; and in Massachusetts, Ward v. Hill, 4 Gray (Mass.) 593; Franklin v. Greene, 2 Allen (Mass.) 519, 522.

an issue was formerly that of an action on a wager as to the facts, but in modern practice this has, in one state at least, given way to a submission of the issue in the form of interrogatories, directed to the point or points as to which the verdict is deemed necessary, and each of which the jury must specially answer.[14]

A distinction is to be noted, however, between awarding an issue to be tried by a jury under the direction of the court of equity, and directing an action at law to be brought for the determination of the particular question. In the first case, the proceedings are wholly under the control of the chancellor or the court of equity awarding the issue, and the only method of redress open to the unsuccessful party is by an application for a new trial,[15] while in the latter the equity suit is suspended until the determination of the legal action, and the latter proceeds according to the usual course in a regular trial at law, including a bill of exceptions and writ of error, the judgment finally entered being accepted by the court of equity as a final decision of the point involved.[16]

Waiver of Right to Jury Trial.

As in the case of any right which should be asserted at a particular stage of the suit, the right of any party to demand that an issue of fact be framed and sent to a jury will generally be lost if not asserted at the proper time, which may be, as we have already seen,[17] when the pleadings were closed and the testimony taken and published, and before the cause has been set down for a hearing by

[14] See Cooper v. Stockard, 16 Lea (Tenn.) 140, 144. In any case, it seems that whether interrogatories are adopted or the issue framed in another form, the method followed would be governed by the pleadings and by the nature and extent of the facts or questions in doubt, and should closely follow the order allowing the application for an award. See Horner v. Harris' Ex'r, 10 Bush (Ky.) 360; Wilson v. Barnum, 1 Wall. Jr. 342, Fed. Cas. No. 17,786; Black v. Shreve, 13 N. J. Eq. 455. The verdict of a jury in a feigned issue out of chancery is not binding on the chancellor, and he may disregard it, and decide the cause according to his own judgment. McDonald v. Thompson, 16 Colo. 13, 26 Pac. 146.

[15] See Clark v. Society, 45 N. H. 331; Watt v. Starke, 101 U. S. 247; Snell v. Loucks, 12 Barb. (N. Y.) 385.

[16] American Dock & Improvement Co. v. Trustees for Public Schools, 37 N. J. Eq. 266.

[17] Ante, p. 114.

the court on the merits, or referred to a master for the same purpose,[18] or at the hearing itself, according to the rule in force in the particular jurisdiction, and the circumstances of the particular case.

New Trial after Verdict upon Issues Awarded.

In proceedings at law, the unsuccessful party is entitled to have a bill of exceptions made up from the exceptions taken at the trial, as one of the methods of obtaining a review of the proceedings, and as a basis for a writ of error to bring the record before a higher court; but in equity the rulings of the court upon the trial of issues of fact before a jury can only be revised or corrected upon an application or motion for a new trial to the court directing the issues.[19] Such motion must be made without improper delay,[20] and may be generally upon the ground that the verdict was contrary to evidence,[21] or for the absence of a material witness, whose presence could not be secured, and whose evidence would be more than corroborative;[22] or because of surprise or fraud; or for newly-discovered evidence, if in conjunction with surprise or fraud;[23] or for improper instructions to the jury, unless, upon the whole evidence, the verdict appears to be a proper one.[24] The granting or refusing of a new trial is a matter within the discretion of the court, as at common law, and, it will be noticed, the grounds upon which it will be allowed are much the same.[25]

[18] Bourke v. Callanan, 160 Mass. 195, 35 N. E. 460.

[19] Apthorp v. Comstock, 2 Paige (N. Y.) 482; Watt v. Starke, 101 U. S. 247. See, also, Snell v. Loucks, 12 Barb. (N. Y.) 385. But this is the case only where an issue has been directed. If an action at law has been directed and tried, an application for a new trial must be made to the court in which it was tried, and will be subject to the rules of that court. Apthorp v. Comstock, 2 Paige (N. Y.) 482.

[20] See Van Alst v. Hunter, 5 Johns. Ch. (N. Y.) 148.

[21] See Grigsby v. Weaver, 5 Leigh (Va.) 197. As to the English rule in such cases, see Metropolitan Ry. Co. v. Wright, 11 App. Cas. 152. As to the American rule, see Clark v. Society, 45 N. H. 331.

[22] Cleeve v. Gascoigne, 1 Amb. 323.

[23] See Kemp v. Mackrell, 2 Ves. Sr. 579.

[24] Clark v. Brooks, 2 Abb. Prac. N. S. (N. Y.) 385. See, also, Alexander v. Alexander, 5 Ala. 517; Waddams v. Humphrey, 22 Ill. 661; Trenton Banking Co. v. Rossell, 2 N. J. Eq. 511; Lansing v. Russell, 13 Barb. Ch. (N. Y.) 510.

[25] A more liberal discretion will be exercised in awarding new trials on feigned issues than at law. Waddams v. Humphrey, 22 Ill. 661.

INJUNCTION.

64. An injunction is a judicial order or process, commanding a party to abstain from doing, or to perform, a certain act therein specified.

65. The objects for which injunctions are issued are generally:

(a) To prevent a threatened wrong or injury, or, if possible, to repair an injury by placing persons or property in the same condition as before such injury was committed; or,

(b) To compel a person to do or perform some act which it is incumbent upon him to do or perform.

66. According to their nature, therefore, injunctions are classified as:

(a) Prohibitory, which command the party to abstain from doing certain acts or continuing a certain line of conduct.

(b) Mandatory, which direct the performance of a specified act.

67. Injunctions are also classified, according to their form and special object, into:

(a) Preliminary or interlocutory injunctions.

(b) Perpetual or final injunctions.

68. PRELIMINARY INJUNCTIONS—A preliminary or interlocutory injunction is one issued at the commencement of the suit or before hearing and decision of the cause, enjoining the defendant until the further order of the court. It is only issued upon a strong prima facie showing by the complainant, may be modified or dissolved by the court at any time in its discretion, and is ipso facto dissolved by a decree in favor of the defendant.

69. PERPETUAL INJUNCTIONS—A perpetual injunction is issued only after the hearing and decision

of the cause, and enjoins the defendant absolutely, according to the matters therein specified. It can only be modified or set aside on a review or rehearing of the cause. A preliminary injunction may be continued and made perpetual upon a decision upon the merits in favor of the complainant.

Among the important remedies of equity are specific performance, injunction, and discovery. The first and last of these will be elsewhere mentioned, under the head of appropriate titles,[1] but the second, perhaps the most important of all by reason of the constant necessity for its use, must be noticed here, as it very often fills a most important part in the proceedings in an equitable suit.

The remedy is one which, while used with caution, most forcibly illustrates the peculiar nature of equitable jurisdiction as compared with that of the courts of common law, since it enables a court of equity to interfere to prevent the commission of an act, or the continuance in a line of conduct, by the party complained against, which, it is shown, will result in irreparable injury to the party complaining.[2] The power also extends to compelling a party to do or perform certain acts, such as to compel an abatement or removal of a nuisance.[3] In the last case it is called a "mandatory injunction," but these are only used where no other remedy is available, and will always be refused if the injury can be compensated in damages, or even if the balance of convenience is strongly

§§ 64–69. [1] Post, c. 4, "Bills for Specific Performance"; p. 287, "Bills of Discovery."

[2] See 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) § 1613 et seq.; Fetter, Eq. § 185 et seq. The process of injunction should be applied with the utmost caution. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which on just and equitable grounds ought to be prevented. Morse v. Mill Co., 42 Me. 119; Maryland Sav. Inst. v. Schroeder, 8 Gill & J. (Md.) 93.

[3] Fetter, Eq. p. 288. See, also, as to mandatory injunctions, Carlisle v. Stevenson, 3 Md. Ch. 499; Thomas v. Hawkins, 20 Ga. 126; Norfolk Trust Co. v. Marye, 25 Fed. 654; Creely v. Brick Co., 103 Mass. 514; Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770. The object thus in view is sometimes accomplished in an indirect manner, as by compelling the respondent to desist from certain acts. See Rogers Locomotive & Machine Works v. Erie Ry. Co., 20 N. J. Eq. 379; Whitecar v. Michenor, 37 N. J. Eq. 6.

on the side of the defendant.[4] Those first mentioned, which are called "prohibitory," are the most frequent, and are issued in a great variety of cases. They are divided into preliminary or interlocutory injunctions, and perpetual or final injunctions, and will be hereafter separately examined.

The cases in which injunctions will be granted are too numerous to be fully stated, but they are generally included in one of the following classes:

(1) To restrain the commencement and prosecution of proceedings at law, as where by accident, mistake, fraud, or some other reason a party has an unfair advantage in a court of law, and it is contrary to equity and good conscience that he should be permitted to use that advantage,[5] though in modern times the enlarged powers of courts of common law to grant new trials have rendered injunctions on this ground infrequent.[6]

(2) To prevent a breach of a negative contract where such breach will result in irreparable injury, and cannot be adequately compensated in damages;[7] as to prevent the violation of a covenant

[4] Deere v. Guest, 1 Mylne & C. 516; Jacomb v. Knight, 3 De Gex, J. & S. 533, 538. See, also, Cole Silver-Min. Co. v. Virginia & Gold Hill Water Co., 1 Sawy. 470, Fed. Cas. No. 2,989; Id., 1 Sawy. 685, Fed. Cas. No. 2,990.

[5] Equity will thus interpose where the separate estate of a wife is levied on for a debt of the husband, if there is no other remedy, Calhoun v. Cozens, 3 Ala. 498; or to prevent a party from making use of a legal writ of execution for purposes of vexation and injustice, Colt v. Cornwell, 2 Root (Conn.) 109; or to prevent the enforcement of a judgment obtained at law, though a court of equity will not generally interfere with such judgments, unless the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law of which he was prevented from availing himself by fraud or accident unmixed with negligence of himself or his agents, Hendrickson v. Hinckley, 17 How. 443. See, also, Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Nevins v. McKee, 61 Tex. 412; Headley v. Bell, 84 Ala. 346, 4 South. 391; Darling v. Mayor, etc., 51 Md. 1; Warner v. Conant, 24 Vt. 351.

[6] Steinau v. Gas Co., 48 Ohio St. 324, 27 N. E. 545; Bailey v. Collins, 59 N. H. 459.

[7] Fetter, Eq. p. 294. That fraud of a successful party will generally sustain an injunction against a judgment, see Greenwaldt v. May, 127 Ind. 511, 27 N. E. 158; Gates v. Steele, 58 Conn. 516, 20 Atl. 474; Wagner v. Shank, 59 Md. 313. The jurisdiction to interfere with the prosecution of actions at law is, as a general rule, exercised only to prevent a multiplicity of suits, and to pre-

in a deed against the subletting of the premises described in the deed,[8] or of contracts in partial restraint of trade, where the limitation is reasonable,[9] or of a contract for exclusive personal services of an extraordinary or unique character,[10] but not of a contract for ordinary personal services, the remedy at law being adequate in the latter case.[11]

(3) To prevent the commission of a tort, where a legal right to property exists, and a violation of that right could not be adequately compensated in damages, or at least without a multiplicity of suits for that purpose, except where the injury would be trivial in amount, or the court, in its discretion, considers that damages alone should be given.[12] This is probably the most important class of injunctions at the present time, and the modern tendency of both English and American courts is to restrain by injunction every species of tort which damages will not adequately compensate, whether to property, person, or reputation.[13] Thus an injunction will be granted to protect real property against waste,[14] tres-

vent interference with the jurisdiction of a court of equity after it has once attached. See Wood v. Swift, 81 N. Y. 31; Platto v. Deuster, 22 Wis. 482; 3 Pom. Eq. Jur. §§ 1370–1374. Courts of equity restrain proceedings at law when necessary to the attainment of justice, not by assuming jurisdiction over the courts in which such proceedings are pending, but by controlling the parties to such proceedings by injunction. Burpee v. Smith, Walk. Ch. (Mich.) 327.

[8] See Tulk v. Moxhay, 2 Phil. Ch. 774; Godfrey v. Black, 89 Kan. 193, 17 Pac. 849.

[9] See McClurg's Appeal, 58 Pa. St. 51; Beal v. Chase, 31 Mich. 490; Butler v. Burleson, 16 Vt. 176; Ropes v. Upton, 125 Mass. 258; Guerand v. Dandelet, 32 Md. 561.

[10] See Lumley v. Wagner, 1 De Gex, M. & G. 604, 616; Cort v. Lassard, 18 Or. 221, 22 Pac. 1054; Daly v. Smith, 49 How. Prac. (N. Y.) 150; McCaull v. Braham, 16 Fed. 37.

[11] De Pol v. Schlke, 7 Rob. (N. Y.) 280; Wm. Rogers Manuf'g Co. v. Rogers, 58 Conn. 356, 20 Atl. 467; Cort v. Lassard, 18 Or. 221, 22 Pac. 1054; Burney v. Ryle, 91 Ga. 701, 17 S. E. 986.

[12] Under. Eq. p. 209, §§ 64–69.

[13] Fetter, Eq. pp. 310, 311.

[14] See Pulteney v. Shelton, 5 Ves. 260, note; Brock v. Dole, 66 Wis. 142, 28 N. W. 334; Mutual Life Ins. Co. v. Bigler, 79 N. Y. 568; Watson v. Hunter, 5 Johns. Ch. (N. Y.) 169; Lavenson v. Soap Co., 80 Cal. 245, 22 Pac. 184. Cf. Moriarty v. Ashworth, 43 Minn. 1, 44 N. W. 531; Harris v. Bannon, 78 Ky. 568;

pass,[15] or nuisance,[16] or to protect property rights in patents and copyrights,[17] and in works of literature, science, and art,[18] and trade-marks.[19] As a general rule, however, none save property rights will be thus protected, unless the violation complained of

Fairbank v. Cudworth, 33 Wis. 358. The power to interfere covers not only legal but what is known as equitable waste. See Lord Bernard's Case, Finch, Prec. 454, 2 Vern. 738; Micklethwait v. Micklethwait, 1 De Gex & J. 504; Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122.

[15] See Anderson v. Harvey's Heirs, 10 Grat. (Va.) 386; Cheesman v. Shreve, 37 Fed. 36; Silva v. Rankin, 80 Ga. 79, 4 S. E. 756; Fulton v. Harman, 44 Md. 251; Thatcher v. Humble, 67 Ind. 444; Mooney v. Cooledge, 30 Ark. 640. As to continued and repeated trespasses, see Musselman v. Marquis, 1 Bush (Ky.) 463; Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686; Wilson v. Hill, 46 N. J. Eq. 367, 369, 19 Atl. 1097; Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703.

[16] See Dittman v. Repp, 50 Md. 516; Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374; Straus v. Barnett, 140 Pa. St. 111, 21 Atl. 253; Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241; Davis v. Sawyer, 133 Mass. 289; Hamilton v. Whitridge, 11 Md. 128. A private person cannot enjoin a public nuisance unless he sustains some special, direct, and substantial damage therefrom, over and above the general damages sustained by the rest of the public. Soltau v. De Held, 2 Sim. (N. S.) 133, 142; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514. And in case of a private nuisance the injury must be of so material a nature that it cannot be well and fully compensated in damages, or be such as from its continuance and permanent mischief might occasion a constantly recurring grievance to lay a foundation for the interposition of a court of equity. See Kerr, Inj. p. 166; Gardner v. Trustees of Village of Newburgh, 2 Johns. Ch. (N. Y.) 162; McCord v. Iker, 12 Ohio, 388; Sellers v. Parvis & Williams Co., 30 Fed. 164; Rouse v. Martin, 75 Ala. 510, 513; Carlisle v. Cooper, 21 N. J. Eq. 576.

[17] Fetter, Eq. pp. 306–308; High, Inj. § 938. The federal courts have exclusive jurisdiction over all questions directly affecting the validity and infringement of patents, Parkhurst v. Kinsman, 6 N. J. Eq. 600; Slemmer's Appeal, 58 Pa. St. 155; and also of all matters pertaining to statutory copyrights, Drone, Copyr. 545–547.

[18] As to prevent the unauthorized publication of works of the above character. Prince Albert v. Strange, 2 De Gex & G. 652; Grigsby v. Breckinridge, 2 Bush (Ky.) 480; Paige v. Banks, 13 Wall. 608. The writer of private letters retains a qualified property in them sufficient to entitle him to an injunction against their publication by the person receiving them. Woolsey v. Judd, 4 Duer (N. Y.) 379; and the person written to has the same property and right as against a stranger, Earl of Granard v. Dunkin, 1 Ball & B. 207; and one delivering lectures, to restrain their publication by those hearing them, for profit, Bartlette v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1,082.

[19] Fetter, Eq. p. 309 (4), and cases cited. As to the jurisdiction of state

or apprehended also involves a breach of trust, confidence, or contract.[20] Thus an injunction was refused in the case of a publication libeling the complainant, though injurious to his business,[21] but was granted where such libel was published with intent to intimidate and drive away his customers.[22]

(4) To prevent breaches of trust, or the violation of equitable rights whenever the circumstances are such that the aid of an injunction is required, as to restrain a trustee from abusing his powers as such,[23] or to restrain a corporation, at the suit of a stockholder, from doing acts beyond the power conferred by its charter,[24] or to restrain the payee of a negotiable instrument, invalid as between himself and the maker, from disposing of the same to an innocent purchaser, in whose hands it would be good against such maker.[25]

Preliminary Injunction.

A preliminary or interlocutory injunction is so called because it is preliminary to the hearing and decision of the cause on its merits, being issued either at the commencement of the suit or at any time thereafter prior to the hearing, according as the necessity for its use is made apparent to the court. Its office is to restrain the defendant, under the penalties therein mentioned, from doing the act or continuing in the particular line of conduct complained of, until the further order of the court; and, as its issuance is a mat-

courts in trade-mark cases, see Small v. Sanders, 118 Ind. 105, 20 N. E. 296; U. S. v. Steffens, 100 U. S. 82.

[20] Fetter, Eq. pp. 310, 311.

[21] Kidd v. Horry, 28 Fed. 773; Whitehead v. Kitson, 119 Mass. 484; Mayer v. Association, 47 N. J. Eq. 519, 20 Atl. 492; Singer Manuf'g Co. v. Domestic Sewing-Mach. Co., 49 Ga. 70.

[22] See Emack v. Kane, 34 Fed. 47; Casey v. Typographical Union, 45 Fed. 135.

[23] Balls v. Strutt, 1 Hare, 146; Cohen v. Morris, 70 Ga. 313.

[24] See Hawes v. Oakland, 104 U. S. 450; Wiswell v. Congregational Church, 14 Ohio St. 31; Small v. Matrix Co., 45 Minn. 264, 47 N. W. 797.

[25] See Metler v. Metler, 18 N. J. Eq. 270; Hinkle v. Margerum, 50 Ind. 240; Moeckly v. Gorton, 78 Iowa, 202, 42 N. W. 648. Under the same principle, see Knight v. Knight, 28 Ga. 165. An injunction in force against the negotiation of a note does not destroy its negotiability. Winston v. Westfeldt, 22 Ala. 760.

ter of discretion, it may be modified or dissolved by the court at any time, upon proper cause shown.[26]

Same—How Issued.

Preliminary injunctions, as a matter of general practice, are usually issued upon an application to the court by motion, upon a bill already filed and one or more supporting affidavits.[27] While the application may be practically simultaneous with the commencement of the suit, it is a rule that, except in a few cases of pressing emergency of a peculiar nature,[28] an injunction will not be issued unless a bill has been already filed, containing a proper statement of facts, a specific prayer for an injunction, and, in general, under the complainant's oath.[29] The showing, as to facts, will necessarily depend upon the nature of the case, and is governed by two principles which are jurisdictional, viz.: The complainant must show (1) that he is without a plain, adequate, and complete remedy at law; and (2) that an irreparable injury will result unless the relief sought is granted.[30] As to the first of these, the question is not whether a remedy in fact exists at law, but whether it is full and complete for the particular case; and, as to the second, the term "irreparable injury" means rather that the injury apprehended is a grievous, or, at least, a material one, and one which dam-

[26] The dissolution of an injunction is a matter of discretion with the court. See Buchanan v. Ford, 29 Ga. 490. And may be examined by the court of its own motion in a proper case. See Conover v. Ruckman, 32 N. J. Eq. 685. See, also, Bechtel v. Carslake, 11 N. J. Eq. 244. But only the judge who granted an injunction will modify or set it aside, except in a case of urgent necessity. Klein v. Fleetford, 35 Fed. 98; Code Silver-Min. Co. v. Virginia & Gold Hill Water Co., 1 Sawy. 685, Fed. Cas. No. 2,990.

[27] It does not seem clear as to whether an injunction will be granted upon the bill alone without any supporting affidavit, but there appears to be no reason why it should not be if the bill is in proper form, though in such case a dissolution might regularly follow in the filing of the answer. See Boslay v. Susquehanna Canal, 3 Bland (Md.) 63; Jones v. Magill, 1 Bland (Md.) 177.

[28] See 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1614–1619; Peck v. Crane, 25 Vt. 146.

[29] See Vliet v. Sherwood, 37 Wis. 165; Howe v. Willard, 40 Vt. 654; Delaware & R. Canal Co. v. Camden & A. R. Co., 16 N. J. Eq. 321, 379; Walker v. Devereaux, 4 Paige (N. Y.) 229. See, also, Campbell v. Morrison, 7 Paige (N. Y.) 157.

[30] Fetter, Eq. § 186.

ages will not adequately compensate,[31] though the latter element seems to have been considered of less importance if a total destruction of the subject-matter in controversy is threatened.[32] Where injunctions are sought to prevent the commission of torts, the statement must show the existence of the legal right asserted by the complainant, and an actual violation of such right by the respondent, or a real probability or danger of such violation.[33] There must be no doubt of the existence of the complainant's legal right,[34] and, if it is established or not disputed, he must show that the act complained of is an actual violation of such right,[35] or at least one which, if carried into effect, must necessarily and inevitably result in a ground of action.[36] Mere apprehension of injury, or mere belief that the act will be done, is not sufficient.[37]

Perpetual or Final Injunctions.

As has been already stated, a perpetual injunction is one which is issued only after hearing and decision of the cause on its merits, generally as part of the decree then rendered, and enjoins the defendant absolutely and permanently from doing or permitting the acts or things therein specified.[38] It is not easy to lay down any definite statement defining and limiting the cases in which an injunction of this character will be granted, but as a general rule

[31] Pinchin v. Railway Co., 5 De Gex, M. & G. 851, 860; Puckette v. Judge, 39 La. Ann. 901, 2 South. 801; Dudley v. Hurst, 67 Md. 44, 8 Atl. 901; Hodge v. Giese, 43 N. J. Eq. 342, 11 Atl. 484; and see Hilton v. Earl of Granville, Craig & P. 283.

[32] Hilton v. Earl of Granville, Craig & P. 283, 297.

[33] Fetter, Eq. § 191.

[34] National Docks Ry. Co. v. Central R. Co. of New Jersey, 32 N. J. Eq. 755; Mammoth Vein Consol. Coal Co.'s Appeal, 54 Pa. St. 183.

[35] Imperial Gaslight & Coke Co. v. Broadbent, 7 H. L. Cas. 600; Earl of Ripon v. Hobart, 3 Mylne & K. 169.

[36] Haines v. Taylor, 10 Beav. 75.

[37] Earl of Ripon v. Hobart, 3 Mylne & K. 169; Haines v. Taylor, 10 Beav. 75; German Evangelical Lutheran Church v. Maschop, 10 N. J. Eq. 57; Jenny v. Crase, 1 Cranch, C. C. 443, Fed. Cas. No. 7,285. As to the facts giving a sufficient ground for jurisdiction in such cases, see Attorney General v. Forbes, 2 Mylne & C. 123; McArthur v. Kelly, 5 Ohio, 139; Owen v. Ford, 49 Mo. 436; East & West R. Co. of Alabama v. East Tennessee, V. & G. R. Co., 75 Ala. 275; Diedrichs v. Railway Co., 33 Wis. 219.

[38] 1 High, Inj. § 8.

it will be only in cases where the defendant has no equitable or legal right to maintain or allow the conditions complained of. Thus, a defendant will be perpetually enjoined against proceeding against the acceptor of a bill of exchange, where, by the sentence of a foreign court, the acceptance has been vacated, such foreign judgment being conclusive.[39] And so, to restrain proceedings on a void judgment;[40] or upon a judgment bond obtained by fraud,[41] or to prevent repeated vexatious litigation respecting the same subject-matter.[42]

As has been stated, an injunction of this character usually forms part of the decree rendered in the cause, and, as it is only issued as a result of a determination of the merits of the controversy, it cannot be issued before a hearing on the merits,[43] and can only be modified or set aside upon a review or rehearing of the cause. Although it may be primarily issued as a result of the decision, it may also be simply the continuance of an interlocutory or provisional injunction, which, granted for the complainant's protection, upon his prima facie showing, pending the hearing of the cause, is affirmed and made perpetual upon a determination of the merits of the controversy in his favor.[44]

PRODUCTION OF DOCUMENTS.

70. In connection with and as a part of the discovery prayed for by the bill, the complainant will generally be entitled to an inspection and examination of all documents or writings referred to in the defendant's answer, and which are called for by the bill

[39] See Burrows v. Jemineau, Sel. Cas. t. King, 69, 2 Strange, 733.

[40] Caruthers v. Hartsfield, 8 Yerg. (Tenn.) 366, on a satisfied judgment; Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65, 69.

[41] Kruson v. Kruson, 1 Bibb (Ky.) 183, 184.

[42] See Lord Bath v. Sherwin, Finch, Prec. 261; Barefoot v. Fry, Bunb. 158.

[43] See State v. Jacksonville, P. & M. R. Co., 15 Fla. 201, 273.

[44] An illustration of this is in the cases of suits for the infringement of patents or copyrights, where the preliminary injunction often obtained to prevent the continuance of the infringement may be made permanent upon the establishment of the complainant's rights as set forth in his bill.

and are clearly relevant to the complainant's case; and the court will generally order their production in such case, if in the defendant's possession or under his control. In some cases, where a document necessary to a complete defense is shown to be in possession of the complainant, the court may order the production of the same for the defendant's benefit. In all cases where it is necessary for a full hearing, the court will order the production of all documents referred to in the pleadings, and which are necessary to complete and clear the issues presented.

An important power of courts of equity, and one which is often exercised, is that of compelling the production of documents or writings in the possession or under the control of the defendant, and when referred to in the defendant's answer, and clearly relevant to the complainant's case, and called for by the bill as part of the discovery desired.[1] The statement of the nature and extent of the complainant's right in this respect is not always clearly made by the authorities, but it may be gathered as the present rule that where the documents in question are clearly shown by both bill and answer to be relevant to the complainant's case, and to be in the possession or under the control of the defendant, their production will be ordered if called for by the complainant,[2] and so if material to both sides of the case;[3] but that the same order will not be made against a complainant in favor of a defendant, who must, to obtain the desired inspection, proceed by filing a cross

§ 70. [1] 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1817; Adams, Eq. (8th Ed.) pp. 13, 349, 350; Langd. Eq. Pl. §§ 216, 217; Lane v. Paul, 3 Beav. 66; Fencott v. Clarke, 6 Sim. 8. And see Roosevelt v. Ellithorp, 10 Paige (N. Y.) 415; Paine v. Warren, 33 Fed. 357; Somerville v. Mackay, 16 Ves. 382; Bischoffsheim v. Brown, 29 Fed. 341; Hoff. Ch. Prac. (2d Ed.) 312; Watts v. Lawrence, 8 Paige (N. Y.) 159.

[2] See Langd. Eq. Pl. (2d Ed.) §§ 216, 217; Story, Eq. Pl. §§ 858-860.

[3] See Sampson v. Swettenham, 5 Madd. 16; Bettison v. Farringdon, 3 P. Wms. 363. But documents falling within the rules as to privileged communications need not be produced. Simpson v. Brown, 33 Beav. 482; Rice v. Gordon, 13 Sim. 580. And see Jenkins v. Bennett, 40 S. C. 393, 18 S. E. 929.

bill,[4] except in a few special cases.[5] If the complainant's right is allowed, and the documents ordered to be produced, the defendant may, by proper steps, protect himself from any prying or impertinent investigation,[6] as the right of the complainant to examine the documents in question is restricted to an inspection of such portions as he can properly read in evidence.

INTERVENTION.

71. A petition for intervention is one filed at an intermediate stage of a pending suit, by a person not a party to such suit, but who claims an interest therein, asking leave to intervene and be made a party thereto either as complainant or defendant, in order to assert his interest in his own behalf.

While not strictly a step in the regular proceedings in the course of an equitable suit, it seems proper to notice a proceeding which may be at any time instituted in connection with a pending suit for the protection of one who, while interested in the subject-matter of the controversy, is unable otherwise to assert his rights in the particular suit by reason of the fact that he has not been made a party to the record.[1] This remedy was adopted from the civil-law procedure, and is most often availed of in cases where a third party claims an interest in property involved in litigation or under the control of the court having jurisdiction over the particular action, as where one, not a party to a suit, asserts title to prop-

[4] Bogert v. Bogert, 2 Edw. Ch. (N. Y.) 399; Lupton v. Johnson, 2 Johns. Ch. (N. Y.) 429; Kelly v. Eckford, 5 Paige (N. Y.) 548.

[5] See Greenl. Ev. (12th Ed.) § 303; Pickering v. Rigby, 18 Ves. 484.

[6] See Bowes v. Fernie, 3 Mylne & C. 632; Mansell v. Feeney, 2 Johns. & H. 320; Robbins v. Davis, 1 Blatchf. 238, Fed. Cas. No. 11,880.

§ 71. [1] See Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; French v. Gapen, 105 U. S. 509; Coleman v. Martin, 6 Blatchf. 110, Fed. Cas. No. 2,985; Anderson v. Railroad Co., 2 Woods, 628, Fed. Cas. No. 358; Page v. Telegraph Co., 18 Blatchf. 118, 2 Fed. 330; Standard Oil Co. v. Southern Pac. Co., 4 C. C. A. 491, 54 Fed. 521; Forbes v. Railroad Co., 2 Woods, 323, Fed. Cas. No. 4,926; Myers v. Fenn, 5 Wall. 205; First Nat. Ins. Co. v. Salisbury, 130 Mass. 303. As to who may not intervene, see Thomas Huston Electric Co. v. Sperry Electric Co., 46 Fed. 75.

erty in the hands of a receiver appointed in the particular suit,[2] or where one has purchased the subject of the suit.[3]

In the absence of any statute or rule of court, a person can only intervene by virtue of an order obtained upon a formal application, which is usually made by petition,[4] and the application can only be granted in certain cases, such as those above mentioned, which arise from necessity,[5] and then only at a proper stage of the cause.[6]

NE EXEAT.

72. The writ of ne exeat is a process issued by courts of equity in certain cases, generally to prevent a person liable upon an equitable debt or claim from leaving the jurisdiction until security has been given to obey the decree of the court.

The writ of ne exeat regno has been suggested as having probably originated in a desire to prevent a subject of the king of England from leaving the kingdom when the king wished to secure control over his person, and seems, as a matter of practice, to have been at first chiefly used for political purposes. Later it was used by the court of chancery, in private cases, in order to secure the presence of the defendant when sued in that court upon an equitable right, and whose departure from the jurisdiction was apprehended, so that it was in fact nothing more than a means of procuring equitable bail.[1]

As a general rule, this writ is granted only in cases of equitable debts and claims, and the equitable demand must be certain in its nature, and not contingent, prospective,[2] or unliquidated.[3] Two classes of cases, however, constitute exceptions to this rule, viz.

[2] 1 Fost. Fed. Prac. (2d Ed.) § 201.

[3] See Anderson v. Railroad Co., 2 Woods, 628, Fed. Cas. No. 358.

[4] 1 Fost. Fed. Prac. (2d Ed.) §§ 201, 202.

[5] Anderson v. Railroad Co., 2 Woods, 628, Fed. Cas. No. 358.

[6] See Central Trust Co. v. Texas & St. L. Ry. Co., 24 Fed. 153.

§ 72. [1] Fetter, Eq. § 200; Dunham v. Jackson, 1 Paige (N. Y.) 629; Johnson v. Clendenin, 5 Gill & J. (Md.) 463; Bonesteel v. Bonesteel, 28 Wis. 245; Cable v. Alvord, 27 Ohio St. 654, 666; Gresham v. Peterson, 25 Ark. 377.

[2] Rico v. Gualtier, 3 Atk. 501. [3] Cock v. Ravle, 6 Ves. 283.

those where a husband, against whom payment of alimony has been actually decreed, is likely to leave the state,[4] and those where, although there is an admitted balance due from the defendant to the complainant, the latter claims a still larger sum.[5]

THE EVIDENCE.

73. After a cause is at issue by the close of the pleadings, the next regular step in the proceedings is the taking of the testimony in support of both complaint and defense. This is generally oral, and is taken out of court in writing, and submitted to the court at the hearing. When filed in court it is published, —that is, opened for the inspection of the respective parties or their counsel and for giving out copies,—at a time generally fixed by rule, order of court, or stipulation of the parties.

74. In addition to the testimony thus taken, the pleadings in the cause will be evidence as to all facts expressly admitted therein, and the answer of the defendant in particular, if under oath, may be evidence for both parties, so far as it is responsive to the bill, though not generally against a co-defendant.

The evidence in an equity cause, as generally spoken of, refers to the oral testimony of the witnesses and the documentary evidence or exhibits offered in connection therewith; but the bill and answer may also be used to establish facts which they expressly admit, and the answer, in particular, to the extent that it is responsive to the bill, and, if sworn to, will be evidence for the defendant as against the complainant, though not generally against a co-defendant, and may also be read in evidence by the complainant if material to the case he states in his bill. So the bill, to the extent of its positive averments of fact, may be read in evidence by

[4] Denton v. Denton, 1 Johns. Ch. (N. Y.) 364.

[5] Jones v. Sampson, 8 Ves. 593; McGehee v. Polk, 24 Ga. 406; Allen v. Smith, 16 N. Y. 415, 419.

the defendant, but not for the complainant beyond the extent to which the same facts are expressly admitted by the answer.[1]

In discussing the evidence in equity, it is therefore proper to notice the nature and effect of the admissions in general, that may be taken advantage of, then the testimony proper, and lastly, as the most important under the head of admissions, the effect of the answer as evidence, that of the bill having been sufficiently mentioned above.

Admissions.

Admissions are generally classified as either (1) upon the record or (2) by act of parties, and the former as either (a) actual or (b) constructive. Reversing the order, and noting, first, constructive admissions, which may be defined as those which would result as natural and proper inferences against a pleader from his own pleading, the only case which need be mentioned is that of the admission by a plea, which will be hereafter explained.[2] The better view is that there is no constructive admission by answer, though the decisions are in conflict.[3] Actual or express admissions are positive statements of fact, in either bill or answer, which operate in favor of the opposing party, and such party is entitled to read them in evidence at the hearing. Both actual and constructive admissions, as considered, would be upon the record.

Admissions by agreement of the parties cover all express stipulations as to facts, which are often made to save the expense and delay of taking testimony or of a hearing, and these, to be regarded by the court, should be in writing, as such agreements, whether by counsel or parties, will not generally be regarded in a court of equity, unless reduced to writing.

§§ 73–74. [1] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 838. But the last proposition does not seem to be accepted in Michigan, where it has been held that a bill in equity is no evidence for complainant; and where the case is submitted on bill and answer, and no exceptions are filed to the latter, relief must be based on the admissions in the answer; and, if it denies or does not admit any averment that is material to the prayer for relief, the bill must fail. Wiegert v. Franck, 56 Mich. 200, 22 N. W. 303.

[2] Post, c. 7, p. 422.

[3] Post, c. 8. A sworn answer to a bill in equity is taken to be true where the cause is heard on bill and answer. Ruhlig v. Wiegert, 49 Mich. 399, 13 N. W. 791.

The Testimony Proper.

When the cause has reached the stage where the bill has been opposed by a plea, demurrer, or disclaimer and answer, or one or more of these methods of defense, it is said to be at issue, and the next step is the taking of the testimony on behalf of both parties, to complete the formal record to be presented to the court at the hearing. According to the strict chancery practice, witnesses are never examined orally in the presence of the court, except to establish some formal matter at the hearing, as to prove an exhibit or the execution of a deed or other instrument, or to identify handwriting; and this rule prevails at the present day in the federal courts of equity, though in most of the states statutes have been enacted providing for a method substantially the same as that followed in trials at law, viz. by oral examination of witnesses or by depositions. In equity practice, as we are considering it, the evidence is presented to the court in writing. The older chancery method was for the testimony to be taken out of court, secretly, before a master or commissioner, upon written interrogatories and cross interrogatories. The method at the present day is substantially the same, except that the witnesses are now examined orally before the master, examiner, or commissioner, by counsel for the respective parties, the testimony reduced to writing in the presence of the parties or their counsel, by the officer before whom it is taken, the deposition of each witness signed by him, and the whole returned to the court under the certificate of the master or officer acting, and filed with the clerk. A certain period—three months in the federal courts [4]—is generally fixed within which the testimony is to be taken, but, even after the hearing, if necessary to the rendition of a proper decree, the court may stay proceedings to allow additional evidence to be presented to correct errors or supply omissions occurring through excusable inadvertence or accident,[5] or evidence which has been newly discovered, and is material, and as to which there has been no laches.[6]

State courts of chancery in this country have assumed the power

[4] Eq. Rule 69. See Ingle v. Jones, 9 Wall. 486.

[5] Hood v. Pimm, 4 Sim. 101; Mulock v. Mulock, 28 N. J. Eq. 15.

[6] See Hood v. Pimm, 4 Sim. 101; Dignan v. Dignan (N. J. Ch.) 17 Atl. 546; Dixon v. Higgins, 82 Ala. 284, 2 South. 289.

to issue commissions to take testimony by deposition, either within or without their jurisdiction, the same as courts of law, and the United States Revised Statutes provide for the issuance of a dedimus potestatem to take depositions "according to common usage" in any case.[7] The acts of congress also provide for the taking of depositions de bene esse, by which "the testimony of any witness may be taken in any civil cause depending in a district or circuit court." [8] When depositions are thus taken under a commission or pursuant to the acts of congress, they are usually upon written interrogatories and cross interrogatories, and when taken are properly certified, sealed up, and transmitted to the clerk of the court in which the suit is pending.

A further method of obtaining evidence in a foreign country, whose government will not recognize a commission to examine witnesses, is by what are called "letters rogatory," which is a writ or commission directed to a foreign magistrate in his official capacity, or to an individual by name, for the taking of the evidence required, and which is generally accompanied by written interrogatories. This writ is granted only on special application, and upon satisfactory proof of the necessity for its use.[9]

Publication.

The student may have elsewhere noticed references to the "publishing" of the testimony, and the significance of the expression is the opening, by the clerk of the court, of all sealed depositions returned to his office, for the inspection of the respective parties or their counsel.[10] Until this takes place, no one has the right to inspect them, and, under the old chancery practice, when testimony was taken secretly, it was the first opportunity afforded for

[7] Rev. St. U. S. 1878, § 866. And by section 867 depositions in perpetuam rei memoriam, taken under the laws of any state, and admissible in its courts, may also be received in evidence in the discretion of the court in the federal courts.

[8] Rev. St. U. S. 1878, § 863.

[9] See 1 Fost. Fed. Prac. (2d Ed.) § 290; 1 Greenl. Ev. § 320; Rev. St. U. S. 1878, §§ 875, 4071–4074.

[10] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 946 et seq. The term seems to have formerly covered the giving out of copies of the testimony, but, as now used, it appears to refer more to the opening for inspection than to anything else. See Eq. Rule 69; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344; Strike's Case, 1 Bland (Md.) 57, 90.

knowing what testimony had been given. The time for publication is usually fixed by order of court or stipulation of the parties.[11]

THE ANSWER AS EVIDENCE.

75. An answer under oath, and on the defendant's knowledge, is evidence on behalf of the defendant, so far as it is responsive to the allegations of the bill, and will prevail in his favor unless overcome by at least the testimony of one witness and clear corroborating circumstances. It is also evidence for the complainant, so far as the facts which it admits are placed in issue by the bill, and so, it seems, if not under oath; but an unsworn answer can only operate in favor of the defendant to put in issue such allegations as it controverts, thus compelling proof by the complainant.

QUALIFICATIONS—(a) In general, answers upon information and belief only, or which deny all knowledge of the facts in controversy, or which merely deny conclusions or inferences of law, or which are founded upon mere hearsay, do not constitute evidence requiring proof by the complainant to overcome them, but only put the complainant to the proof of his own allegations.

(b) As between several defendants, an answer by one defendant is not evidence against a co-defendant unless the latter claims through the party answering, or unless the relation in which the defendants stand renders them jointly interested or liable.

(c) In modern practice, if the complainant, instead of filing his replication to the answer, has the cause set down for hearing upon the bill and answer only, the allegations of the answer are taken as true, whether responsive or not.

[11] The practice in the federal courts is regulated under Eq. Rule 69.

The General Rule.

We shall hereafter see that the answer must generally be under oath, unless the oath is waived by the complainant.[1] When thus sworn to and filed, it becomes more than a pleading, as it stands as evidence in the cause, as to all material matters which it sets forth,—for the complainant, so far as it aids his case, and for the defendant so far as it opposes the allegations of the bill,—provided it is responsive to the bill, and is made upon the knowledge of the defendant.[2] The rule has therefore been adopted in courts of equity that where a defendant, by his answer under oath, fully controverts the allegations of the bill, and the testimony of only one witness is offered to sustain the allegations so denied, the court will not render a decree.[3] In other words, and as the rule is now generally expressed, an answer under oath which is responsive to the bill is evidence for the defendant, and the complainant must overcome it by the evidence of two witnesses, or by that of one witness and clear corroborating circumstances, or it will prevail;[4]

§ 75. [1] Post, c. 8.

[2] See Story, Eq. Pl. § 849a, note (a), as to when a sworn answer does not come under the general rule.

[3] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 844, and cases cited.

[4] Story, Eq. Pl. § 849a, citing 2 Story, Eq. Jur. §§ 1528, 1529; Bank of United States v. Beverly, 1 How. 134, 151; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847; Daniel v. Mitchell, 1 Story, 172, Fed. Cas. No. 3,562; Union Bank of Georgetown v. Geary, 5 Pet. 99; Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153. See, also Hine v. Dodd, 2 Atk. 275; Cooth v. Jackson, 6 Ves. 12, 40; Stearns v. Stearns, 23 N. J. Eq. 167; Wilson's Ex'rs v. Cobb's Ex'rs, 28 N. J. Eq. 177; Stafford v. Bryan, 1 Paige (N. Y.) 239; Smith v. Brush, 1 Johns. Ch. (N. Y.) 459; Turner v. Knell, 24 Md. 55; Hough v. Richardson, 3 Story, 659, Fed. Cas. No. 6,772; Morgan v. Tipton, 3 McLean, 339, Fed. Cas. No. 9,809; Appleton v. Horton, 25 Me. 23; Eastman v. McAlpin, 1 Ga. 157; Towne v. Smith, 1 Woodb. & M. 115, Fed. Cas. No. 14,115; Miles v. Miles, 32 N. H. 147; McDowell v. Bank, 1 Har. (Del.) 369; Beatty v. Smith, 2 Hen. & M. (Va.) 395; Mason v. Peck, 7 J. J. Marsh. (Ky.) 300; Gray v. Faris, 7 Yerg. (Tenn.) 155; Lenox v. Prout, 3 Wheat. 520; Voorhees v. Bonesteel, 16 Wall. 16; Johnson v. Crippen, 62 Miss. 597; Railroad Co. v. Mellon, 104 U. S. 112; Reed's Appeal (Pa.) 7 Atl. 174; Carter v. Carter, 82 Va. 624; Vigel v. Hopp, 104 U. S. 441; Morrison v. Durr, 122 U. S. 518, 7 Sup. Ct. 1215; Bent v. Smith, 22 N. J. Eq. 560. An answer in equity, responsive to the bill, and positively denying the facts charged, is entitled to so great weight that, when confirmed by testimony, even of a kind not the most satisfactory, it will counter-

but allegations not responsive to the bill must be established by proof.[5] The effect of the rule is thus to cast upon the complainant the burden of proof as to all matters to which the answer is re-

vail a case which, on its face, is a suspicious one. Parker v. Phetteplace, 1 Wall. 684. A sworn answer in chancery is not equal to two witnesses, for two witnesses will overcome it. Morrison v. Stewart, 24 Ill. 24. But, when demanded by the complainant, it is equal in weight to one disinterested witness. Culbertson v. Luckey, 13 Iowa, 12. An answer directly responsive to the bill must prevail against the testimony of one witness, however full, clear, and explicit, unless supported by corroborating circumstances, which, when disconnected from the evidence of the witness, would tend to establish those charges which are denied by the answer, and would of themselves be evidence for that purpose. Beene's Heirs v. Randall's Heirs, 23 Ala. 514. As instances where the testimony of one witness with corroborative evidence was held sufficient, see Brittin v. Crabtree, 20 Ark. 309; Preschbaker v. Feaman's Heirs, 32 Ill. 475. As to corroborating circumstances, see Brittin v. Crabtree, 20 Ark. 309; Durham v. Taylor, 29 Ga. 166; Gould v. Williamson, 21 Me. 273; Field v. Wilbur, 49 Vt. 157; Deimel v. Brown, 136 Ill. 586, 27 N. E. 44; Morrison v. Durr, 122 U. S. 518, 7 Sup. Ct. 1215. The complainant cannot discredit the answer of the defendant, nor impair its effect, by impeaching the general character of the defendant for truth and veracity. Brown v. Bulkley, 14 N. J. Eq. 294.

[5] Randall v. Phillips, 3 Mason, 378, Fed. Cas. No. 11,555; Lane v. Marshall, 15 Vt. 85; Gardiner v. Hardey, 12 Gill & J. (Md.) 365; Cocke v. Trotter, 10 Yerg. (Tenn.) 212; Todd v. Sterrett's Legatees, 6 J. J. Marsh. (Ky.) 425; Cartledge v. Cutliff, 29 Ga. 758; Fisler v. Porch, 10 N. J. Eq. 243; Atwater v. Fowler, 1 Edw. Ch. (N. Y.) 417; Coleman v. Ross, 46 Pa. St. 180; Cloud v. Calhoun, 10 Rich. Eq. (S. C.) 358; Wasson v. Gould, 3 Blackf. (Ind.) 18; Ison v. Ison, 5 Rich. Eq. (S. C.) 15; Thouvenin v. Helzle, 3 Tex. 57; Paynes v. Coles, 1 Munf. (Va.) 373; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Wells v. Houston, 37 Vt. 245; McCoy v. Rhodes, 11 How. 131; Allen v. O'Donald, 28 Fed. 17; Cecil v. Cecil, 19 Md. 73; Salmon v. Clagett, 3 Bland (Md.) 125; Gibson v. McCormick, 10 Gill & J. (Md.) 65; Barton v. Barton, 75 Ala. 400; Bradley v. Webb, 53 Me. 462; O'Brian v. Fry, 82 Ill. 274; Hart v. Carpenter, 36 Mich. 402; Rogers v. Mitchell, 41 N. H. 157. Where an answer does not show a different case from that set up in the bill, but sets up new matter in avoidance, it is not evidence of such new matter. Schwarz v. Wendell, Walk. (Mich.) 267; Attorney General v. Oakland County Bank, Id. 90; Van Dyke v. Davis, 2 Mich. 144; Hunt v. Thorn, Id. 213. Where the answer is called for on oath, and the defendant of his own knowledge fully and fairly negatives any allegation of the bill, complainant can have no relief depending upon that allegation, unless the answer is overcome by more than the equally full testimony of one witness. Roberts v. Miles, 12 Mich. 297.

sponsive, and which it does not expressly admit; but the rule itself is not absolute, as it seems that inconsistency between the denial made by the answer and facts which it also sets up as a defense may destroy its effect as evidence,[6] and strong circumstances, without the oral testimony of any witness, may also be sufficient to overcome it.[7] But while the rule, as generally stated, is substantially as given above, it has been thought best to state the minimum of evidence required as at least that of one witness and clear corroborating circumstances, as the latter will be sufficient in case the testimony of two witnesses cannot be obtained, but, as a general rule, no less will suffice.[8]

Answers not Evidence.

We have already noted that a defendant must answer according to his knowledge, if he has knowledge, regarding the matters charged in the bill, and, if not, according to his information and belief as to such matters; but, as a general rule, the answer of a defendant who has no personal knowledge of the facts he states, and (as it is expressed) whose conscience cannot be affected thereby, and who therefore answers on information and belief, is not evidence, although responsive to the allegations of the bill.[9] The same is true, also, and for obvious reasons, where the defendant

[6] As where, though denying fraud, it contains statements from which no reasonable doubt can be entertained that fraud exists. Wheat v. Moss, 16 Ark. 243, 254. See, also, Commercial Bank v. Reckless, 5 N. J. Eq. 650; Brown v. Bulkley, 14 N. J. Eq. 294; Dunham v. Gates, 1 Hoff. Ch. (N. Y.) 185; Morris v. White, 36 N. J. Eq. 327; Forrest v. Frazier, 2 Md. Ch. 147.

[7] See Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153; Union Bank of Georgetown v. Geary, 5 Pet. 99, 111; Bowden v. Johnson, 107 U. S. 251, 263, 2 Sup. Ct. 246.

[8] McDonald v. McDonald, 16 Vt. 630. Where an answer is discredited on some point, it will not be sustained against the testimony of one witness. Young v. Hopkins, 6 T. B. Mon. (Ky.) 18. See, also, Gunn v. Brantley, 21 Ala. 633; Countz v. Geiger, 1 Call. (Va.) 191; Prout v. Roberts' Adm'r, 32 Ala. 427.

[9] Dutilh v. Coursault, 5 Cranch, 349, Fed. Cas. No. 4,206. See, also, Loomis v. Fay, 24 Vt. 240; Cunningham v. Ferry, 74 Ill. 426; Knickerbacker v. Harris, 1 Paige (N. Y.) 209; Stevens v. Post, 12 N. J. Eq. 408; Drury v. Conner, 6 Har. & J. (Md.) 288; Parkman v. Welch, 19 Pick. (Mass.) 231; Pennington v. Gittings, 2 Gill & J. (Md.) 208; Bellows v. Stone, 18 N. H. 465; Coleman v. Ross, 46 Pa. St. 180; Newman v. James, 12 Ala. 20; Lawrence v. Lawrence, 21 N. J. Eq. 317.

alleges absolute ignorance of the matters in controversy,[10] as such an answer cannot prove anything; and it is also true where the answer merely denies inferences or conclusions of law,[11] or where it is founded upon mere hearsay.[12] In these cases, except where the defendant denies all knowledge, the answer is effective only as a pleading, which raises an issue for determination, thereby putting the complainant to the proof of his allegations;[13] and, consequently, the latter need not increase his proof in order to overcome it.

Answer as between Several Defendants.

The general rule as to the effect of the answer of one defendant in favor of or against a co-defendant, as gathered from the authorities, is that it cannot be read in evidence against a co-defendant,[14] except where the latter claims through the party answering,[15] or where there is a unity of interest or a joint liability between them,[16] or where one defendant, as he may, adopts the answer of another;[17]

[10] See Deimel v. Brown, 136 Ill. 586, 27 N. E. 44.

[11] See Belford v. Crane, 16 N. J. Eq. 265; Adams v. Adams, 21 Wall. 185; Hoboken Bank for Savings v. Beckman, 33 N. J. Eq. 53.

[12] See Dugan v. Gittings, 3 Gill (Md.) 138; Lawrence's Ex'rs v. Lawrence's Adm'rs, 4 Bibb (Ky.) 357; Deimel v. Brown, 136 Ill. 586, 27 N. E. 44.

[13] Dutilh v. Coursault, 5 Cranch, C. C. 349, Fed. Cas. No. 4,206; Dugan v. Gittings, 3 Gill (Md.) 138; Lawrence v. Lawrence, 21 N. J. Eq. 317; Coleman v. Ross, 46 Pa. St. 180; Wilkins v. May, 3 Head (Tenn.) 173.

[14] Attwood v. Small, 6 Clark & F. 232, 282; Leeds v. Insurance Co., 2 Wheat. 380; Van Reimsdyk v. Kane, 1 Gall. 630, Fed. Cas. No. 16,872; Robinson v. Sampson, 23 Me. 388; Conner v. Chase, 15 Vt. 764; Phœnix v. Dey, 5 Johns. (N. Y.) 412; Singleton v. Gayle, 8 Port. (Ala.) 270; Webb v. Pell, 3 Paige (N. Y.) 368; Stewart v. Stone, 3 Gill & J. (Md.) 510. In Florida it has been held that a joint answer by husband and wife cannot be read against the wife where the subject-matter relates to her estate of inheritance, Lewis v. Yale, 4 Fla. 418; but otherwise in New York, Dyett v. Coal Co., 20 Wend. (N. Y.) 570.

[15] See Field v. Holland, 6 Cranch, 8; Fitch v. Stamps, 6 How. (Miss.) 487; Osborn v. Bank, 9 Wheat. 738. But see Winn v. Albert, 2 Md. Ch. 169, 176.

[16] See Jones v. Jones, 13 Iowa, 276; Adkins v. Paul, 32 Ga. 219; May v. Barnard, 20 Ala. 200; Christie v. Bishop, 1 Barb. Ch. (N. Y.) 105; Judd v. Seaver, 8 Paige (N. Y.) 548; Conner v. Chase, 15 Vt. 764; Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 153. In an action between partners to settle partnership accounts inter se, the answer of one partner cannot be used to charge another. Chapin v. Coleman, 11 Pick. (Mass.) 331; Bevans v. Sullivan, 4 Gill (Md.) 383.

[17] See Chase v. Manhardt, 1 Bland (Md.) 336.

but, where responsive to the bill, the answer of one defendant may be read in favor of a co-defendant.[18] The rule applies with particular force where the co-defendant against whom the answer is sought to be read is really a party complainant,[19] and is also effective to prevent the answer of an agent from being read against his principal.[20]

Answer as between Complainant and Defendant.

The effect of making the answer evidence in the cause is that it may be read in evidence at the hearing of the cause, for and against the defendant, as furnishing sufficient proof of the facts which it recites or admits.[21] It is evidence for the complainant, so far as it is responsive to the bill, and so far as he chooses to read and adopt it as evidence,[22] while the admissions which it expressly makes are conclusive upon the defendant.[23]

Hearing on Bill and Answer Only.

The effect of the answer as evidence is much greater, when, instead of filing a replication to the answer and completing the series of pleadings in regular form, the complainant has the case set down for hearing on bill and answer alone; or the same action is taken by the defendant upon the failure to file a replication, the allegations of the answer being then taken as true, whether they are responsive to the demands of the bill or not.[24]

[18] Mills v. Gore, 20 Pick. (Mass.) 28; Miles v. Miles, 32 N. H. 147; Powles v. Dilley, 9 Gill (Md.) 222; Davis v. Clayton, 5 Humph. (Tenn.) 446.

[19] Field v. Holland, 6 Cranch, 8.

[20] Leeds v. Insurance Co., 2 Wheat. 380.

[21] When an answer is called for on oath, whatever is responsive to the bill is evidence for as well as against defendant. Schwarz v. Wendell, Walk. (Mich.) 267.

[22] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 839, 840. And see Bartlett v. Gillard, 3 Russ. 149; Price v. Lytton, 3 Russ. 206. If the party who asks for the discovery does not use the answer, it is not his evidence, and he cannot be concluded by it, and may use other evidence to establish the fact in reference to which discovery is sought. Carson v. Flowers, 7 Smedes & M. (Miss.) 99.

[23] Marsh v. Mitchell, 26 N. J. Eq. 497.

[24] Slason v. Wright, 14 Vt. 208; Fordyce v. Shriver, 115 Ill. 530, 5 N. E. 87; Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36; Snyder v. Martin, 17 W. Va. 276; Durfee v. McClurg, 6 Mich. 223. See, also, Eq. Rule 41; Corbus v. Teed, 69 Ill. 205.

DEMURRER TO INTERROGATORIES.

76. Where a witness, under examination upon interrogatories, has reason to protect himself against answering particular questions, he may do so by a demurrer to interrogatories, which is a statement of his reasons for not answering such question.

77. The two principal grounds upon which a witness may thus protect himself are:

(a) That the answer, if given, would subject him to a penalty or forfeiture, or tend to render him criminally liable; or,

(b) That such answer would involve a breach of professional confidence.

Where a witness is examined in a court of law, he has the right to obtain an immediate ruling of the court as to whether he may decline to answer a particular question, but in courts of equity he has no such opportunity, his testimony being taken before a master or examiner, who has no power to rule upon the propriety of any questions which may be asked him.[1] To preserve his right to protect himself against injustice or injury to himself, or injury to the rights of others who are entitled to protection through him, a remedy is afforded by the demurrer to interrogatories, which enables him to have his objection preserved and submitted to the court for its decision. This remedy is by allowing him to state, on oath, the reasons for his refusal to answer a question or interrogatory, all of which is taken down in writing and returned with the interrogatories.[2] The word "demurrer," however, is here used in a different sense than when applied to the mode of objecting to the bill, depending entirely upon extrinsic facts, while the latter applies only to defects apparent upon the face of the bill. There is no particular form for a demurrer to interrogatories, and it is believed that it is not now commonly known by this designation,

§§ 76–77. [1] See Eq. Rule 67, as amended at the December term, 1861.
[2] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 942, 943.

though the grounds upon which it may be based are still universally recognized.

Where a Penalty or Forfeiture would be Incurred.

The first of the two principal cases where a witness may protect himself from answering is where the answer to the particular question, if given, would subject him to infamy or disgrace, or convict him of a crime or misdemeanor. It is a general principle of law that no one is bound to testify so as to subject himself to punishment, and a witness may therefore demur to an interrogatory the answer to which, however remotely connected with the fact, might tend to prove him guilty of a crime or misdemeanor, or to render him infamous.[3] The same course would be open to a witness who was questioned as to his knowledge of facts required by public policy to be kept secret, as if a grand juryman was asked to disclose what took place in the jury room,[4] or a government official to disclose secrets of state.

Where a Breach of Professional Confidence is Involved.

The second principal ground on which a witness may refuse to answer is that it would involve a breach of professional confidence by disclosing communications or matters which the law, for reasons of public policy, and in the interests of justice, holds as privileged.[5] The chief, and perhaps the only, instance in which the privilege formerly existed, seems to have been in the case of legal advisers, such as attorneys, solicitors, and proctors, and their clients,[6] but statutes have extended it until confidential communi-

[3] 1 Daniell, Ch. Pl. & Prac. 942, and see Id. 563–569, where the principles applicable are discussed with reference to refusing to give a discovery for the same reason. Post, c. 6, "The Demurrer"; c. 8, "The Answer." See also, East India Co. v. Campbell, 1 Ves. Sr. 246; Cartwright v. Green, 8 Ves. 405; Waters v. Earl of Shaftesbury, 12 Jur. (N. S.) 3; Wallis v. Duke of Portland, 3 Ves. 494; Hayney v. Coyne, 10 Heisk. (Tenn.) 339; Selby v. Crew, 2 Anstr. 504; Livingston v. Tompkins, 4 Johns. Ch. (N. Y.) 415, 432; Northrop v. Hatch, 6 Conn. 361; Wolf v. Wolf's Ex'r, 2 Har. & G. (Md.) 382; Marsh v. Davison, 9 Paige (N. Y.) 580; Coburn v. Odell, 30 N. H. 540.

[4] The statutes of the different states generally provide that the proceedings of the grand jury shall be kept secret.

[5] See 1 Daniell, Ch. Pl. & Prac. 942, 943; and the discussion of the principles applicable as to the right to withhold discovery in similar cases, Id. 571–578.

[6] The early cases discussing the nature of this privilege, and upholding it,

cations between physicians and their patients, and between clergymen and members of their church in the course of discipline enjoined by the latter, are also protected.[7] It is unnecessary to discuss the subject here, but it may be stated, generally, that the privilege is extended to all communications made to the persons mentioned, in their professional capacity, as well as to documents and information acquired by them in such capacity. Where an attorney or physician may thus refuse to answer, as to matters affecting a client or patient, however, the right to withhold such answer is not the privilege of the witness, but that of the client or patient, and may be waived by its holder at any time.

THE HEARING.

78. When the cause has been fully prepared, by the completion of the pleadings and evidence, it is set down for hearing on its merits, at which time it is presented to the court, and argued by counsel for the respective parties.

After the cause is ready, the necessary pleadings being on file and the testimony closed, it is the duty of the complainant to have the same set down for hearing by the court, and by this we here mean a final hearing on the merits, for the purpose of obtaining a final decree disposing of the controversy. Interlocutory hearings may have been had upon motions or petitions presented since the filing of the bill, but, if these have not been already heard, the court may dispose of them also at the final hearing.[1] The cause

seem always to have been cases where the depositaries of the confidential communications to be protected were attorneys. See Greenough v. Gaskell, 1 Mylne & K. 98, 100; Desborough v. Rawlins, 3 Mylne & C. 515; Richards v. Jackson, 18 Ves. 472; Hughes v. Biddulph, 4 Russ. 190; Bolton v. Liverpool Corp., 3 Sim. 467; Herring v. Clobery, 1 Phil. Ch. 91.

[7] See Anderson v. Bank, 2 Ch. Div. 644; Freel v. Railway Co., 97 Cal. 40, 31 Pac. 730; People v. Harris, 136 N. Y. 423, 33 N. E. 65; Foster v. Hall, 12 Pick. (Mass.) 89; People v. Gates, 13 Wend. (N. Y.) 311; and the statutes of the several states; post, c. 6, "Demurrer"; c. 8, "Answer."

§ 78. [1] See Consequa v. Fanning, 3 Johns. Ch. (N. Y.) 364; Gibson v. Rees, 50 Ill. 383.

must be set down within a time fixed by the rules of the court, and is then placed upon the calendar by the clerk, in its order, which last, as a matter of practice, may be, for instance, the order in which the replications have been filed. When the cause is reached, the method of presenting it to the court may vary according to the prevailing practice in different courts. It may be, for instance, by a brief statement by the counsel for the complainant of the facts of his case, with the reading of the pleadings to the court, followed by a similar statement of the facts and claims on the part of the defendant; and the evidence taken may also be read in the order in which it applies to the controversy, first that on behalf of the complainant, then that offered by the defendant, and last any that has been taken by the complainant in rebuttal. No general statement can well be given beyond this, as the methods of procedure are not uniform.

Following the formal presentment of the case as mentioned, and after the disposal of any interlocutory motions or applications pending, or of objections that may be taken at this time, come the arguments of counsel for the respective parties, which are usually oral, in the presence of the court, or accompanied by briefs, or the cause may be submitted on the pleadings, evidence, and briefs alone, without formal argument, as the rules may prescribe or discretion of the court allow. In argument the right to open and close is with the party who holds the affirmative of the issue, and upon whom the burden of proof rests, as at common law.[2] This is generally the complainant, but the burden may be shifted by the allegations or admissions of the pleadings or by the evidence, so that the defendant may obtain the privilege which, though less important than at common law, by reason of the absence of a jury, is still to be obtained, if possible. With the close of the arguments the cause, in modern practice, is usually left with the court for decision. If the cause is not set down for hearing as required, the bill may be dismissed, upon the application of the defendant, for want of prosecution.[3]

[2] See Higdon v. Higdon, 6 J. J. Marsh. (Ky.) 48.

[3] See 1 Fost. Fed. Prac. (2d Ed.) § 296.

Objections at the Hearing.

As a general rule, no merely formal objection can be urged at the hearing, and all preparatory steps which a party had the right to insist upon, being taken before the hearing, will be waived if the cause is heard without objection at the proper time.[4] If it plainly appears at the hearing that the complainant has an adequate remedy at law, or that from some other cause there is an absolute want of chancery jurisdiction, objection may be taken at any stage of the cause, or the court may dismiss the bill of its own motion; but as to objections for defect of parties, generally, the hearing is not the proper time for them, though an indispensable party may then be brought in.[5] Whether an objection will then be allowed will generally depend upon whether the party has not waived his right to assert it, and whether its allowance is necessary to the proper disposal of the controversy.

Dismissal of Bill at Hearing.

It has been already stated that, if the complainant fails to proceed with the cause by having the same set for hearing, the defendant may have the same dismissed for want of prosecution; and the same is true if the former fails to reply to any plea, or to set down a plea or demurrer for hearing within the prescribed time, though the court may, in case of a failure in the last particular, and upon proper cause shown, allow further time.[6] Failure to file a replication, where the latter is required, entitles the defendant to a dismissal as of course, in the federal courts, but the court may now allow such filing nunc pro tunc, upon motion, for cause shown, and upon proper terms, the complainant submitting to speed the cause, etc.[7] The bill must thus be dismissed if the answer completely denies all the equities it shows or claims, and the answer is not opposed by proof or denied by a replication; and the same may be true, even with a general replication, where

[4] See Allen v. Mayor, etc., 18 Blatchf. 239, 7 Fed. 483; 1 Fost. Fed. Prac. (2d Ed.) § 299.

[5] See Eq. Rules 52, 53; post, c. 6; and see Armstrong v. Armstrong, 19 N. J. Eq. 357, 360.

[6] See Eq. Rules 38; Chicago & A. R. Co. v. Union Rolling-Mill Co., 109 U. S. 702, 3 Sup. Ct. 594.

[7] See Eq. Rule 66.

the answer contains the same complete denial, and the cause is set for hearing on the three pleadings alone.[8] So a dismissal would naturally follow where an objection is made for want of parties, and the complainant neglects to amend his bill by adding them, or where complainants, suing jointly, fail to make out a case for both, or where a cause of action against several jointly is not so established.[9]

The action of the court in dismissing the bill operates in one of two ways: If the dismissal is for any cause falling short of a test of the merits of the case, as for repugnancy, misjoinder or nonjoinder of parties, multifariousness, want of jurisdiction, or any formal defect, it is called a dismissal "without prejudice,"[10] and has only the effect of defeating the particular suit,—as where a plea in abatement is sustained at common law,—the complainant being at liberty to renew the suit if he chooses;[11] while, if the dismissal follows after a hearing upon the merits of the case, it is called an "absolute dismissal," and bars the right to bring another bill for the same cause of action.[12] Cases arise, also, where the title

[8] See Parker v. Town of Concord, 39 Fed. 718; Patton v. J. M. Brunswick & Balke Co. (Fla.) 2 South. 366.

[9] In the first of these cases the dismissal would follow for an obvious reason, and in the last two the result would depend chiefly upon the rule requiring the proof to correspond with the allegations and be confined to the point in issue, thus avoiding a variance.

[10] Crosier v. Acer, 7 Paige (N. Y.) 137. And see Magill v. Trust Co., 81 Ky. 129. As to repugnancy, see Ledsinger v. Central Line of Steamers, 79 Ga. 716, 5 S. E. 197. Misjoinder of parties, see House v. Mullen, 22 Wall. 42, 46. Nonjoinder of parties, see Detweiler v. Holderbaum, 42 Fed. 337. Per Bradley J.: "A dismissal for want of parties does not render the subject of controversy res judicata. It leaves the merits unconsidered and undisposed of." St. Romes v. Cotton-Press Co., 127 U. S. 614, 619, 8 Sup. Ct. 1335. See, also, Oyster v. Oyster, 28 Fed. 909, where the form of the decree, though using the words "without prejudice," made it a final decree.

[11] The use of the words "without prejudice" indicates an intention, or at least leaves the complainant at liberty, to take further steps at some later time. See Howth v. Owens, 30 Fed. 910.

[12] A bill regularly dismissed on the merits may be pleaded in bar to a new bill for the same matter, but, to make a decree of a dismissal of a bill on the merits a bar, it must be an absolute decision upon the same point or matter, and the new trial must be brought by the same plaintiff who filed the original

to real estate is in dispute, and then the general rule is to retain the bill, staying proceedings until the termination of the legal action.[18]

THE DECREE.

79. The decree of a court of chancery is its order or sentence determining and adjusting the rights and interests of the parties to the suit upon the issues submitted and heard.

80. Decrees are generally divided, according to their nature, into:

(a) Interlocutory decrees (p. 146).

(b) Final decrees (p. 148).

81. An interlocutory decree is one which settles some step or matter in the cause preparatory to the hearing, or preliminary to the final disposition of the cause, without disposing of the cause upon its merits.

82. A final decree is one which disposes of the suit on its merits, leaving nothing further for the court to do; or one which fully decides all material questions involved in the controversy, and provides for all possible contingencies which may arise, so that no further exercise of the judicial power is required.

The decree in equity, giving the word its most common significance, corresponds to the judgment of the court at common law, and is the formal order or sentence of the court determining the rights and interests of the parties to the suit, after a hearing and submission of the cause on its merits. Its office is perhaps a more important one than that of the judgment of a court of law following a jury trial, in being the judicial act of the court itself, rather than a formal approval of the decision or verdict of the jury, and also because its recitals and directions are detailed and

bill, or his representatives, against the same defendant or his representatives. Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1.

[18] Wilkin v. Wilkin, 1 Johns. Ch. (N. Y.) 111; Coxe v. Smith, 4 Johns. Ch. (N. Y.) 271. See, also, Brown v. Coal Co., 40 Fed. 849.

explicit as to all the rights and interests before the court, but, in their relative position in the course of the proceedings, the two stand alike. Whether falling within one or the other of the two classes which we shall mention, the decree or decretal order embodies the formal sentence of the court upon the particular matter before it, and, if made upon the merits of the cause or upon some contested interlocutory step, are generally preceded by the opinion of the court, announcing its conclusions or decision and the reasons therefor, and directing the entry of the decree in conformity therewith.

The two general classes into which decrees are divided, and which we shall consider after noticing the formal requisites of a decree in general, are (1) interlocutory, which include all orders made during the progress of the cause aside from the determination of its merits, and (2) final, which dispose of the material questions at issue. The distinction between the two will be hereafter explained, and its importance rests upon the fact that, since the universal enactment of statutes governing appeals, the right to appeal exists in general only from final decrees.[1] The granting of an interlocutory decree or order is almost always an exercise of discretion by the court, and no appeal lies in such a case, except where the discretion has been plainly abused,[2] or where some recognized rule exists controlling its exercise, a disregard of which would prejudice the rights of the complainant.[3]

Interlocutory Decrees.

Interlocutory decrees and orders are those made by the court during the progress of the cause, and which do not dispose of the controversy on its merits, but which direct the performance of some act or step preparatory to the hearing, or to the final disposition of the cause.[4] Of this class is an order or decree referring a

§§ 79–82. [1] See post, p. 154.

[2] See Nelms v. Clark, 44 Ga. 617; Privett v. Calloway, 75 N. C. 233; In re Beggs, 67 N. Y. 120.

[3] See Vanderveer's Adm'r v. Holcomb, 22 N. J. Eq. 555.

[4] In 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) * p. 986, an interlocutory decree is defined as one "when the consideration of the particular question to be determined, or the further consideration of the cause generally is reserved till a future hearing." No generally accepted definition, or at least none entirely

question to a master in chancery,[5] or directing a feigned issue to be framed, or ordering money paid into court, or appointing a receiver.[6] A distinction is taken between a decree and a decretal order, the first being made upon the hearing, the latter upon some motion or petition presented at another time, but the office of each is practically the same so long as both are interlocutory. The test as to whether a decree is interlocutory or final seems to be whether the merits of the controversy, as a whole or in any material part, are still open for determination, or finally disposed of; but it is true, at the same time, that a decree is not to be regarded as interlocutory because, though the rights of the parties have been determined, there is still something to be done to carry it into effect.[7] So long, however, as any material part of the controversy

satisfactory, can be found in any of the authorities, since the line is now largely drawn under statutes which limit the right of appeal to final decrees, and the decisions are conflicting. See Cocke's Adm'r v. Gilpin, 1 Rob. (Va.) 20, 27; Manion v. Fahy, 11 W. Va. 482; Rowley v. Van Benthuysen, 16 Wend. (N. Y.) 369; Perkins v. Fourniquet, 6 How. 206. An order of a court of equity suspending a sale and operating as a continuation and removal of a former order of sale is not a final decree. Dorsey v. Thompson, 37 Md. 25. A decree in equity requiring money to be paid into court by the complainant, enjoining the defendants from further proceedings at law against the complainant, and requiring them to interplead and answer, is merely interlocutory, and subject to alteration and revision at any time prior to final decree. Such a decree, therefore, if prematurely passed, may with propriety be rescinded. Barth v. Rosenfeld, 36 Md. 604.

[5] See Jaques v. Episcopal Church, 17 Johns. (N. Y.) 548; Green v. Fisk, 103 U. S. 518; Parsons v. Robinson, 122 U. S. 112, 7 Sup. Ct. 1153; Beebe v. Russell, 19 How. 283; Ogilvie v. Insurance Co., 2 Black, 539.

[6] Where money is directed to be paid into court, or property to be delivered to a receiver or to a new trustee, or where anything is to be done which may be the subject of exception, the decree is not final, but interlocutory only. Bellamy v. Bellamy, 4 Fla. 242; Forgay v. Conrad, 6 How. 201. See, also, Garner v. Prewitt, 32 Ala. 13; Noel's Adm'r v. Noel's Adm'r, 86 Va. 109, 9 S. E. 584; Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 10; Beebe v. Russell, 19 How. 283; Brush Electric Co. v. Electric Imp. Co., 2 C. C. A. 378, 51 Fed. 557; Lodge v. Twell, 135 U. S. 232, 235, 10 Sup. Ct. 745; Railroad Co. v. Swasey, 23 Wall. 405; Young v. Smith, 15 Pet. 287.

[7] See Coithe v. Crane, 1 Barb. Ch. (N. Y.) 21; McKinley v. Irvine, 13 Ala. 681; Lewisburg Bank v. Sheffey, 140 U. S. 445, 11 Sup. Ct. 755; Mills v. Hoag, 7 Paige (N. Y.) 18; Thomson v. Dean, 7 Wall. 342. Cf. Johnson v. Everett, 9 Paige (N. Y.) 636.

is left undecided, decrees or orders already made are generally regarded as interlocutory.[8] The nature of the distinction will be better understood from a comparison of the two classes of decrees than from any explanation that can be given in the space available here.

Final Decrees.

A final decree, under the strict chancery practice, is one which fully decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court.[9] It is not final because it settles one or more material questions involved in a case, if others remain to be determined;[10] but it may be final, although it contains a direction for an interlocutory proceeding, such as a reference to a master, if, at the same time, it provides for all the contingencies which may arise upon his report, and leaves no necessity for any further order of the court, save for the confirmation of such report, to give all parties the full benefit of the decision. Under statutes limiting the right of appeal to final decrees, the same difficulty arises, as to what are to be so considered, which we have already mentioned in regard to interlocutory decrees and orders, the decisions being conflicting. It is conceived, however, that any decree which fully decides all the merits of the cause, doing away with the necessity for any further judicial action, because there is nothing left to be decided, would be regarded as final, even though some further action by the court would be required to carry it into effect.[11] A "final decree" has often been defined as one which ter-

[8] See Ryan's Adm'r v. McLeod, 32 Grat. (Va.) 367, 376; Cocke's Adm'r v. Gilpin, 1 Rob. (Va.) 20; Jameson v. Jameson's Adm'x, 86 Va. 51, 9 S. E. 480; Forbes v. Tuckerman, 115 Mass. 115.

[9] See Barb. Ch. Prac. (2d Ed.) 330; 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 993, 994; Mills v. Hoag, 7 Paige (N. Y.) 18.

[10] Pulliam v. Christian, 6 How. 209; Shinn v. Smith, 79 N. C. 310; Cocke's Adm'r v. Gilpin, 1 Rob. (Va.) 20, 27. See, also, St. Louis, I. M. & S. R. Co. v. Southern Exp. Co., 108 U. S. 24, 2 Sup. Ct. 6; Missouri, K. & T. Ry. Co. v. Dinsmore, 108 U. S. 30, 2 Sup. Ct. 9.

[11] As, for instance, where a decree upon the merits of a controversy is made, establishing the rights of all parties in interest in and to certain property, and directing a sale of such property; the claims of each party to be satisfied from the proceeds of such sale. Here the ministerial act of confirming the sale and

minates the suit, and leaves nothing further for the court to do; but under the present practice it by no means necessarily ends the proceedings then and there, and, though the court may still be called upon to take such steps as are necessary to carry the decree into effect, the latter, if not affecting the merits of the cause as already determined, do not render the decree interlocutory.[12] In the federal courts a final decree must be one which puts an end to all contest on the merits of the cause,[13] but after such a decree there may be a further or ancillary decree, upon questions relating to the matters already decided, which may also be final, and be appealed from.[14]

Consent Decrees.

It is a matter of common practice for decrees to be entered by consent of all parties before the court, and a court will generally favor all stipulations of the parties for this or like purposes, provided the object they seek to attain is within the scope of the case shown by the pleadings, as its jurisdiction in the particular case is controlled by the latter.[15]

ordering a division of the proceeds must still be done, but all that required an exercise of the judicial power of the court has been determined. But see Johnson v. Everett, 9 Paige (N. Y.) 636; Garrard v. Webb, 4 Port. (Ala.) 73. Cf. Jones v. Wilson, 54 Ala. 50.

[12] See Lewisburg Bank v. Sheffey, 140 U. S. 445, 11 Sup. Ct. 755; Hoffman v. Knox, 1 C. C. A. 535, 50 Fed. 484; Stovall v. Banks, 10 Wall. 583; Jameson v. Jameson's Adm'rs, 86 Va. 51, 9 S. E. 480.

[13] Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15; Grant v. Insurance Co., 106 U. S. 429, 1 Sup. Ct. 414; Dainese v. Kendall, 119 U. S. 53, 7 Sup. Ct. 65; Parsons v. Robinson, 122 U. S. 112, 7 Sup. Ct. 1153; Winthrop Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. 111.

[14] See Farmers' Loan & Trust Co., Petitioner, 129 U. S. 206, 9 Sup. Ct. 265. See, also, as to the final and interlocutory decrees, 2 Beach, Mod. Eq. Prac. §§ 938–953.

[15] See 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 973, 974; Pacific R. R. v. Ketchum, 101 U. S. 289.

CORRECTION OR REVERSAL OF DECREES.

83. Where an order or decree is erroneous, or it is unjust that it be enforced, it may be corrected, modified, annulled, or reversed by one of the following methods:

(a) In case of interlocutory orders or decrees:

(1) By order of court, upon motion, or

(2) Upon a rehearing.

(b) In case of final decrees:

(1) Upon a rehearing, or by a new or supplemental bill in the nature of a bill of review, if the decree has not been enrolled.

(2) By bill of review for defects in substance; and, if the decree has been enrolled, formal or technical errors or defects by petition.

(c) If obtained through fraudulent means, by a bill to impeach such decree on that ground.

(d) By appeal.

84. Except in cases of appeals, the allowance of proceedings for the above purposes rests in the sound discretion of the court, and the party applying must show proper grounds for the relief sought, and must not have been guilty of laches. Unless another remedy is provided by statute, an unsuccessful party may always have a final decree reviewed by a higher court, on appeal, as a matter of right; and, in some states, by statute, the same right is preserved as to interlocutory orders and decrees.

The power of courts of equity to correct, modify, or set aside decrees and orders made by them, whether interlocutory or final, at the time at which they are made, and provided an appeal has not been taken, is undisputed; but the method by which this is accomplished depends upon several things, such as the nature of the defect complained of, the fact whether such defect does or does not appear upon the face of the record, and the stage at which the

aid of the court is invoked. Whether such discretion will be exercised or not also depends upon the merits of the application made, as well as upon the fact that the party applying has not been guilty of laches; and, in general, if an appeal has been taken, whether the time for any such action has passed. The different methods followed will be noticed in the order in which they are mentioned above.

SAME—INTERLOCUTORY DECREES—MOTION OR REHEARING.

85. An interlocutory order or decree will generally be corrected or amended by the court, in its discretion and upon motion, provided a material change or alteration of the decree is not thereby involved. If the change or alteration is in a material part, the method is properly by rehearing, upon petition.

The above proposition is stated with considerable hesitation, since there does not appear to be any clear line of division between the cases where relief will be granted upon motion and where the court will require a rehearing. The errors for which decrees and orders may be called in question have been classed as errors clerical and errors judicial.[1] The first, since they amount to no more than defects in form, may generally be corrected at any time previous to the entry of the final decree;[2] while the latter, which are mistakes or errors of the court in the conclusions which the decree embodies, can be amended, as a general rule, only upon a rehearing or on appeal.[3] Probably this distinction may be taken as indicating, in the absence of a statute prescribing the method, what course would be taken in disposing of the question raised; and the accepted practice, so far as it can be uniformly stated, seems to be that, where it is sought to vary or alter a decree in any material respect, a rehearing will be required, except, perhaps, where suffi-

§ 85. [1] Hop Bitters Manuf'g Co. v. Warner, 28 Fed. 577.

[2] See Eq. Rule 85.

[3] Forquer v. Forquer, 19 Ill. 68; Stringer v. Anderson, 23 W. Va. 482; Hop Bitters Manuf'g Co. v. Warner, 28 Fed. 577.

cient appears upon the face of the record to dispense with any necessity for further evidence or information to justify action by the court.

SAME—REHEARING.

86. Where it is sought to correct, modify, or set aside a final decree, before the same has been enrolled or entered, and in some cases when the same relief is sought as to interlocutory decrees or orders, the court may, in its discretion, and upon the petition of the party aggrieved, direct a rehearing of the cause. This is generally a new hearing, reargument, and a new consideration of the cause upon the pleadings and evidence already presented, by the court in which the cause was originally heard.

As a matter of general practice, the method of procedure to correct, vary, or set aside decrees is by a rehearing of the cause, where the decree has not been "enrolled," as it is termed,—that is, before the close of the term in which it is rendered; all decrees in chancery being considered as enrolled or entered as of the term in which they are made.[1] If the application is made before the time indicated, it rests in the discretion of the court to grant or refuse it, but with the close of the term at which such decree was rendered, the jurisdiction of the court to vary, annul, or reverse it is exhausted, and the only means available is a new proceeding, which we shall notice presently.

A rehearing, when granted, is upon the petition of any party to the record who can show a proper case, which petition must be in the regular form, as to title of the cause, signature of counsel, etc., and must fully set forth the grounds upon which the reconsideration of the case is asked.[2] By the equity rule, unless the record also discloses upon its face the facts stated, the petition must be verified by the oath of the party or of some other person.[3]

§ 86. [1] Whiting v. Bank, 13 Pet. 6.

[2] See 1 Fost. Fed. Prac. (2d Ed.) § 352.

[3] See Eq. Rule 88.

SAME—BILLS OF REVIEW.

87. After a decree has been enrolled, though clerical or technical errors may still be corrected by petition, an application to vary or set aside such decree for any matter of substance can only be made by a bill of review. Decrees entered by consent cannot be thus reviewed, however, unless obtained by fraud or to correct some mistake.

As we have already stated, an application to vary or set aside a decree, unless made before the close of the term of court at which it was rendered, must be by a new proceeding; and the method adopted, except where it is sought to impeach the decree on the ground of fraud in obtaining it, is by what is known as a "bill of review." This will be hereafter separately considered, but it may be said here that, while it is a new proceeding and in form an independent one, it is not strictly an original suit, but is dependent upon that already completed, and is not an available remedy except under these circumstances. In the case of what are called "consent decrees," the action of the parties ordinarily prevents any resort to this remedy, unless the question of fraud is raised,[1] or in a clear case of mistake.[2]

Where available, a bill of review is generally supported on two grounds: (1) Errors in law apparent upon the record; and (2) new matter discovered since the filing of the original bill and material to the cause.

§ 87. [1] See Thompson v. Maxwell, 95 U. S. 391; Vincent v. Matthews, 15 R. I. 509, 8 Atl. 704. See, also, Armstrong v. Cooper, 11 Ill. 540; Turner v. Berry, 3 Gilman (Ill.) 54.

[2] See Vincent v. Matthews, 15 R. I. 509, 8 Atl. 704; Lester v. Mathews, 58 Ga. 408.

SAME—BILLS TO IMPEACH DECREES.

88. Whenever a decree has been obtained by fraud, and is solely founded on such fraud, it may be impeached and annulled by an original bill for that purpose. This remedy is in the nature of a bill of review, but is an original and independent proceeding, and is available without leave of court first obtained.

Whenever the decree of a court of equity has been obtained by fraudulent means, the party aggrieved may obtain redress by having the decree annulled by the court upon an original proceeding by bill, and the parties will, so far as is possible, be restored to their former condition.[1] To maintain such a bill, however, the decree must rest solely on the fraud practiced, and it must appear that, without the fraud complained of, no decree would have been rendered. This remedy will also be fully noticed hereafter.[2]

SAME—APPEALS.

89. An appeal, in general, is the means whereby an unsuccessful or injured party obtains the removal of a cause from the court before which the same was tried, to a higher court, for a review of the proceedings in the court below upon certain specified points, either of law or fact, or both. As a rule, an appeal can only be taken from a final decree, though in some jurisdictions interlocutory decrees are also appealable.

The right of appeal is perhaps the one most frequently exercised by an unsuccessful party to obtain a review of the merits of the cause which has been decided against him, since by an appeal the whole case, both the facts and the law applied, are brought before the appellate tribunal for review and revisal. This remedy is now generally regulated by statute, and cannot be fully discussed here,

§ 88. [1] Story, Eq. Pl. §§ 526-428. [2] Post, c. 4, p. 316.

save by explaining its nature and effect, and stating the general method by which appellate jurisdiction is exercised. While in a measure analogous to the writ of error at common law, it is not derived from the latter, but owes its origin to the civil law, and is distinguished from the common-law remedy by reason of the fact that it removes the cause entirely to the appellate court, subjecting both facts and law to review by that court, while the writ of error removes nothing for re-examination but questions of law alone.[1]

As a general rule, an appeal in equity procedure lies only from a final decree[2] such as allows the case on appeal to be examined as to its merits;[3] an interlocutory order or decree, which does not directly touch the merits of the cause nor make any final determination of it, being, in the absence of a statute allowing an appeal, and except as brought before the appellate court as incidental to a final decree appealed from, subject to review and revision only by the court or judge making it.[4] The rule as to appeals is not uniform, however, some of the states allowing appeals from interlocutory decrees and orders; and in the federal courts, under what is known as the "Evarts Act," which provided for the establishment of the present circuit court of appeals, interlocutory orders or decrees granting or continuing injunctions, in a cause in which an appeal from a final decree could be taken to that court, are now appealable.[5]

Decrees entered by consent, whether final or not, are not generally appealable, being accepted as the expression of the deliberate agreement of the parties;[6] nor can an appeal be taken from

§ 89. [1] See Wiscart v. Dauchy, 3 Dall. 321.

[2] Lyman v. Alexander, 9 Fla. 489; Keirle v. Shriver, 11 Gill & J. (Md.) 405; Read v. Robb, 4 Yerg. (Tenn.) 66; Hall v. Lamb, 28 Vt. 85; Buel v. Street, 9 Johns. (N. Y.) 443.

[3] Hall v. Lamb, 28 Vt. 85; Clark v. Shelton, Hemp. 207, Fed. Cas. No. 2,833b.

[4] See Mapes v. Coffin, 5 Paige (N. Y.) 296. But an appeal from a final decree in a cause will generally open for consideration all interlocutory decrees already rendered in the same cause which have a bearing upon it. Jaques v. Trustees, 17 Johns. (N. Y.) 548.

[5] 26 Stat. c. 517, § 7.

[6] See Nashville, C. & St. L. Ry. Co. v. U. S., 113 U. S. 261, 5 Sup. Ct. 460; Winchester v. Winchester, 121 Mass. 127.

an exercise of discretion except in the case of a manifest abuse of such discretion.[7] The mere fact that an order or decree is granted in the exercise of a discretionary power, however, does not seem, of itself, to necessarily exclude an appeal, since the question whether the discretion was properly exercised may itself be a subject of appeal;[8] and the rule does not apply where it clearly appears that the lower court refused an order, not on grounds within its discretion, but because the judge thought that the merits of the case were against the moving party.[9]

Appeals can only be taken by parties to the suit[10] or their representatives, or by persons who are allowed to intervene in the suit, and thus become quasi parties; and different parties to the same suit may take "cross appeals," as they are called, though the right of any party to appeal seems to be subject to the limitation that he cannot generally avail himself of this remedy against a decree which is entirely in his own favor,[11] certainly not if he has accepted its benefits.[12]

[7] See Vanderveer's Adm'r v. Holcomb, 22 N. J. Eq. 555, 559, where it was held that, where the discretion of the chancellor was "controlled and governed by a fixed and determined rule, the failure to apply which would substantially affect the legal and equitable rights of the complainant, an appeal would lie"; citing Camden & A. R. & Transp. Co. v. Stewart, 21 N. J. Eq. 485; Rowley v. Van Benthuysen, 16 Wend. (N. Y.) 378.

[8] See Farmers' Loan & Trust Co., Petitioner, 129 U. S. 206, 215, 9 Sup. Ct. 265.

[9] Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 553.

[10] Sayre v. Grymes, 1 Hen. & M. (Va.) 404. See, also, Arrowsmith v. Rappelge, 19 La. Ann. 327; White v. Malcolm, 15 Md. 529; Aiken v. Smith, 4 C. C. A. 652, 54 Fed. 894; Guion v. Insurance Co., 109 U. S. 173, 3 Sup. Ct. 108; Ex parte Cockcroft, 104 U. S. 578. If the interest is determined pending the suit below, the party who has thus parted with it cannot be heard on appeal. Card v. Bird, 10 Paige (N. Y.) 426; Mills v. Hoag, 7 Paige (N. Y.) 18. As to who is to be deemed "aggrieved" by the judgment below, the following test has been adopted: "Would the party have had the thing if the erroneous judgment had not been given?" Adams v. Woods, 8 Cal. 306.

[11] See Ringgold v. Barley, 5 Md. 186. A party cannot appeal from a decree in his own favor appointing him administrator, where its effect could be avoided by a refusal to accept the appointment. Succession of Decoux, 5 La. Ann. 140.

[12] Moore v. Floyd, 4 Or. 260. See, also, Cuyler v. Moreland, 6 Paige (N. Y.) 273.

The method of taking an appeal is regulated by statute or rules of court, but invariably, it is believed, a bond or undertaking is required as security for the performance of the decree appealed from and for the payment of all costs. An appeal must be taken and perfected within a certain time, fixed either by statute or rule of court, and, if by the former, the time cannot be extended by the court.[13] In the federal courts, the procedure is the same as that in regard to writs of error in actions at law.[14] Appeals are also limited by the amount in controversy, and, if the appeal is taken by the complainant, the test is the sum or amount of his demand; if the respondent appeals, the sum or amount with which the decree charges him.[15]

When before the higher court, an equity case is open for review as to both law and fact, and it is its duty to decide whether the court below committed manifest and injurious errors in its decree;[16] and, as a general rule, no objections will be considered unless the record shows that they were properly interposed in the court below.[17] Formal or technical defects cannot be taken advantage of unless so presented, and even then it seems that the rule of "error without prejudice" will be applied as at law. The appeal also brings up for review, if required, all interlocutory orders or decrees made during the progress of the cause, though in themselves not appealable; but the action of the appellate court will be confined, in general, to a consideration of the objections

[13] Dooling v. Moore, 20 Cal. 141. Whether the court may, when the time for appeal is fixed by statute, and has passed, relieve the party in cases of hardship, by ordering the judgment set aside so as to be entered again or in any other manner, see Townsend v. Townsend, 2 Paige (N. Y.) 413; Stone v. Morgan, 10 Paige (N. Y.) 615; Salles v. Butler, 27 N. Y. 638.

[14] Rev. St. U. S. 1878, § 1008.

[15] See Kendrick v. Spotts, 90 Va. 148, 17 S. E. 853; U. S. v. Mosby, 133 U. S. 273, 10 Sup. Ct. 327; Brant v. Gallup, 111 Ill. 487; Evans v. Sanders, 10 B. Mon. (Ky.) 291. See, also, Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494; Svanoe v. Jurgens, 144 Ill. 507, 33 N. E. 955; Harman v. City of Lynchburg, 33 Grat. (Va.) 37.

[16] Leicester Piano Co. v. Front Royal & Riverton Imp. Co., 5 C. C. A. 60, 55 Fed. 190. See Central Trust Co. v. Seasongood, 130 U. S. 482, 9 Sup. Ct. 575.

[17] Brockett v. Brockett, 3 How. 691. See, also, Leicester Piano Co. v. Front Royal & Riverton Imp. Co., 5 C. C. A. 60, 55 Fed. 190.

presented by the appellant, which are usually presented according to a prescribed method, and upon whom rests the burden of showing that error has been committed.[18]

ENFORCEMENT OF DECREES.

90. Decrees of courts of equity may be enforced by one or more of the following methods:

(a) By process against a disobedient party for contempt of court (p. 159).

(b) By writ of sequestration (p. 160).

(c) By writ of assistance (p. 161).

(d) In the federal courts, and in some states, by writ of execution (p. 163).

Independent of any statute, and according to the early English practice, courts of chancery could act only against the person of the respondent, and could not affect his title to his land; but the powers of such courts have been considerably extended in this respect, until they now have power to issue all process necessary to carry their decrees into effect, the methods used, in some states and in the federal courts, being, in addition to the regular means available, the same as at common law.[1] The existence of adequate powers in this respect is an obvious necessity, a decree rendered by a court without power to enforce it being practically, at least, a nullity; and this necessity was recognized at an early date, as shown by the adoption of the method of sequestration, contrary to the accepted theory as to the jurisdiction of courts of equity being only over the person.[2]

[18] Leicester Piano Co. v. Front Royal & Riverton Imp. Co., 5 C. C. A. 60, 55 Fed. 190. See, also, Buckingham v. McLean, 13 How. 150; Ridings v. Johnson, 128 U. S. 218, 9 Sup. Ct. 72; Clair v. Terhune, 35 N. J. Eq. 336.

§ 90. [1] See Eq. Rules 8, 92, and Rev. St. U. S. 1878, §§ 985, 986.

[2] See post, p. 160.

SAME—CONTEMPTS—PROCESS FOR CONTEMPT.

91. Where any party neglects or refuses to obey an order or decree of a court of equity, a writ of attachment or other process may be issued against his person, requiring his arrest and detention until he purges himself of the contempt by obeying the terms of the decree.

If a party disregards or refuses to obey an order or decree of any court, he is said to be in contempt, and may be punished as well as compelled to obey such order or decree.[1] If the defendant to a suit in equity, against whom a decree has been rendered, neglects or refuses to obey it, or attempts to prevent its due execution, he is guilty of a contempt of court; and the court making such decree may, upon the facts being presented, issue its process, —commonly a writ of attachment,—directing the marshal, sheriff, or other proper officer to take the person of such defendant, and have him before the court at a designated time to answer concerning the contempt charged.[2] He must then "purge himself of the contempt," as it is technically expressed, by compliance with the decree or order, and will not be discharged, nor be heard further in the cause, until the duty or act imposed is fully performed, and, generally, all costs resulting from his misconduct paid.[3] This form

§ 91. [1] The authority to punish for contempt is granted as a necessary incident in establishing a tribunal as a court. U. S. v. New Bedford Bridge, 1 Woodb. & M. 401, Fed. Cas. No. 15,867. And see Ex parte Kearney, 7 Wheat. 38; Clark v. People, 1 Ill. 340; In re Chiles, 22 Wall. 157; Rev. St. U. S. 1878, § 725; Eq. Rule 8; Mallory Manuf'g Co. v. Fox, 20 Fed. 409.

[2] An attachment for contempt of court will not be granted, however, unless a clear case is established against the offending party; and, if the contempt is not committed in facie curiæ, it must be shown by the affidavits of those who witnessed it. In re Judson, 3 Blatchf. 148, Fed. Cas. No. 7,563. See, also, Wyatt v. Magee, 3 Ala. 94; Hogan v. Alston, 9 Ala. 627; Androscoggin & K. R. Co. v. Androscoggin R. Co., 49 Me. 392; Buffum's Case, 13 N. H. 14; Richards v. West, 3 N. J. Eq. 456; Lindsay v. Hatch, 85 Iowa, 332, 52 N. W. 226; Grand Junction Canal Co. v. Dimes, 18 Law J. Ch. 419.

[3] See Johnson v. Pinney, 1 Paige (N. Y.) 646; Mussina v. Bartlett, 8 Port. (Ala.) 277; 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) c. 10, § 14.

of process differs from the writ of attachment at common law, in being a process against the person, and not to seize his property;[4] and also from the writ of capias ad satisfaciendum, which is a common-law process against the person to obtain a satisfaction of a judgment. The party in contempt is not entitled to the benefit of any exemption, and, if imprisoned by the court for contumacy, as he may be, has no remedy by which he can regain his liberty except by the writ of habeas corpus.[5]

It is the duty of the officer to whom the writ is directed to make a proper return of the same, as in the case of a subpœna, and, if the party cannot be found, the return is to that effect, and is called a "return non est inventus." This return, if made, is the foundation for further proceedings to compel performance of the decree.

SAME—SEQUESTRATION.

92. If, upon a writ of attachment, the return is that the defendant cannot be found within the jurisdiction, the complainant may be entitled to a writ of sequestration.

93. A writ of sequestration is a process or commission, directed either to the proper officer of the court, or to certain persons nominated by the complainant and accepted by the court, commanding him or them to enter upon and take possession of the property of the defendant, receive the rents and profits thereof, and pay or dispose of the same as the court shall direct, until the party in contempt shall comply with the decree. Its object is thus to enforce performance of the decree, but the proceeds realized may be applied directly in payment of the complainant's demand.

[4] See Shipman, Com. Law Pl. (2d Ed.) 148.

[5] The supreme court will not grant a habeas corpus where the party has been committed for contempt by a court having competent jurisdiction, and, if granting it, will not inquire into the sufficiency of the cause of the commitment. Ex parte Kearney, 7 Wheat. 38. See, also, Clark v. People, 1 Ill. 340; Bickley v. Com., 2 J. J. Marsh (Ky.) 572.

In addition to the methods already noted [1] of compelling the appearance of a defendant, is that of a writ of sequestration which was issued to take possession of his property, like the writ of attachment at common law; but it is not believed that this process is now used save to enforce obedience to an interlocutory or final decree, though in some states it is made a statutory means of obtaining control of a defendant's property at the inception of the suit, in order to hold it for the satisfaction of the judgment or decree. In chancery practice it is a writ or commission, issued after a return of non est inventus upon an attachment for contempt, directed to certain persons, generally four, of the complainant's nomination, commanding or authorizing them to enter upon and take possession of the property, both real and personal, of the disobedient party, receive its rents and profits, and hold the same subject to the further order of the court, until he has fully complied with the directions of the decree.[2] The sequestrators appointed act as officers of the court, and are under its control, and the writ, when issued for the enforcement of a final decree, is analogous to an execution at law. The writ of sequestration is not in common use at the present day, though still an ordinary remedy in some states; but it remains available in chancery practice, unless expressly superseded by some other mode of procedure.

SAME—WRIT OF ASSISTANCE.

94. A writ of assistance is a process issued to place in possession of property the person or persons entitled to such possession under a decree. It can generally be issued only on the application of a party to the suit, and only against those affected by the decree.

The writ of assistance, or "writ of possession," as it is often called, is a remedy of long standing in equity procedure, and corresponds to what is called the writ of habere facias possessionem at common

§§ 92-93. [1] Ante, p. 65.

[2] 2 Daniell. Ch. Pl. & Prac. (6th Am. Ed.) 1050, 1051; Keighler v. Ward, 8 Md. 254; Roberts v. Stoner, 18 Mo. 481. See, also, Bateson v. Choate, 85 Tex. 239, 20 S. W. 64; Long v. Kee, 42 La. Ann. 899, 8 South. 610; Bayard's Appeal, 72 Pa. St. 453; Parker v. Grammer, Phil. Eq. (N. C.) 28.

law. Whenever an injunction to obtain possession of property has been issued, or a receiver or sequestrators, or other persons, appointed by the court to take possession, or any party to the suit is entitled to such possession under the decree, a writ of assistance may be issued to compel the transfer of the possession of such property to the person or persons entitled to it.[1] It is also issued to put in possession a purchaser at a sale under a decree,[2] as a decree of foreclosure, for instance,[3] and should be regularly applied for by a party to the cause, though it seems to be now available, also, for the assignee or grantee of a purchaser.[4] The issuance of the writ is a matter of discretion with the court, upon a proper showing for its necessity, according to the procedure adopted.[5] The method formerly in use in Maryland and New Jersey included a demand of possession by the purchaser of the tenant in possession, accompanied by an exhibit of the deed from the sheriff or master; an order to deliver possession; an injunction; and, lastly, a writ of assistance.[6] At the present time it seems that the writ of assistance is the only process, and issues, in the first instance, upon proof of the service of an order for possession or of demand of possession, and of refusal to comply therewith.[7] The power of the court will not be exercised, however, in case of doubt, nor to decide any question of legal title.[8] The writ will issue, in

§ 94. [1] Eq. Rules, 9, 10. See Valentine v. Teller, Hopk. Ch. (N. Y.) 422; Fackler v. Worth, 13 N. J. Eq. 395; Irvine v. McRee, 5 Humph. (Tenn.) 554; Commonwealth v. Diffenbach, 3 Grant, Cas. (Pa.) 368; Devaucene v. Devaucene, 1 Edw. Ch. (N. Y.) 272; Gelpeke v. Railroad Co., 11 Wis. 454; Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609; Terrell v. Allison, 21 Wall. 289.

[2] See Lynde v. O'Donnell, 21 How. Prac. (N. Y.) 34; Farmers' Loan & Trust Co. of New York v. Chicago & A. Ry. Co., 44 Fed. 653.

[3] Terrell v. Allison, 21 Wall. 289; Howard v. Railway Co., 101 U. S. 837.

[4] See Eq. Rules 9, 10; Farmers' Loan & Trust Co. of New York v. Chicago & A. Ry. Co., 44 Fed. 653.

[5] Van Meter v. Borden, 25 N. J. Eq. 414. In Beatty v. De Forest, 27 N. J. Eq. 482, the court seem to consider the issuance of the writ in a proper case a matter of right, if no reasonable ground of equity is interposed.

[6] See Schenck v. Conover, 13 N. J. Eq. 220.

[7] See Schenck v. Conover, 13 N. J. Eq. 220.

[8] The writ is a summary process only used when the right is clear, and when there is no equity or appearance of equity in the defendant, and where the sale and proceedings under the decree are beyond suspicion. Blauvelt v. Smith,

general, only against parties to the record, or those who have come into possession since the commencement of the suit.[9]

SAME—EXECUTION.

95. A writ of execution is a process, issued by the court in which a final decree has been rendered, for the purpose of carrying such decree into effect.

96. When available in equity procedure, it is issued as a matter of right, except when prohibited by the terms of the decree itself, or where such right is suspended by proceedings for an appeal, or by some other method of securing an enforcement of the decree, or by agreement.

The writ of execution has been made by statute a remedy for enforcing decrees for the payment of money, and for deficiencies on foreclosure sales, both in the federal courts [1] and in those of some of the states; and, when used, is the same in its nature and office as at common law. It is issued from the court by which the decree is rendered, and the successful party is entitled to it, where its use is authorized, as a matter of right, unless the terms of the decree prohibit it;[2] and it is "executed" by a "levy," and must be returned to the court from whence it issues, with the proper indorsement of the doings of the officer to whom it is directed, the same is in common-law procedure.[3]

With this process, or with the adoption of one or more of the methods already mentioned for the enforcement of a final decree, the end of the regular proceedings in an equitable suit is reached,

22 N. J. Eq. 31. See, also, Terrell v. Allison, 21 Wall. 289; Thompson v. Smith, 1 Dill. 458, Fed. Cas. No. 13,977; Thomas v. De Baum, 14 N. J. Eq. 37.

[9] Terrell v. Allison, 21 Wall. 289; Blauvelt v. Smith, 22 N. J. Eq. 31. See, also, Chadwick v. Beach Co., 42 N. J. Eq. 602, 8 Atl. 650.

§§ 95–96. [1] See Eq. Rules 8, 92.

[2] It was so held in New York in Otis v. Forman, 1 Barb. Ch. 30.

[3] The methods of enforcing and completing the evidence of the doings upon all forms of process in this country are substantially the same, but it would be impossible here to give an accurate statement of the details of practice in the different jurisdictions.

the remedy still to be mentioned being available only under circumstances of unusual occurrence.

SAME—BILLS TO ENFORCE DECREES.

97. A bill to enforce a decree is one brought to carry into effect a decree previously rendered, where from the neglect of the successful party to secure its enforcement, or from some other cause, its performance cannot be accomplished without the aid of the court.

Bills to enforce decrees are entertained by courts of equity to carry out either their own or the decrees of other courts of equity, where from the lapse of time through neglect, or from some other cause, the rights of the parties as at first defined have become so uncertain that an additional decree of the court must be made to settle and carry them into effect. This form of remedy is hereafter fully considered.[1]

MOTIONS AND PETITIONS.

98. In all interlocutory applications to the court for its interference as to matters arising during the progress of the cause, the party applying proceeds in one of two ways:

(a) By motion; or (p. 165),

(b) By petition (p. 165).

99. A motion is an oral application or request, by a party to the cause or his counsel, as to the matter concerning which the interference of the court is sought. It may be of course or special, and made ex parte or upon notice.

100. A petition is a similar application, but in writing. It may be presented as of course in some instances, but will generally be heard only after notice, by a service of such petition upon all parties interested.

§ 97. [1] Post, c. 4, p. 318.

Motions.

Any oral application or request to the court for its interference at any stage of the cause, as to a matter then arising, such as to grant or dissolve an injunction, or to award a feigned issue, or to allow an amendment to a pleading, is called a "motion." [1] It is only so called when the application is made orally, as this and the fact that it can only be made by a party to the record seem to be the chief difference between motions and petitions.[2]

Motions are either of course,—that is, which are granted as a matter of course under some standing rule or established procedure of the court,[3]—or special,—which rest upon some particular ground that must be made to appear, and which are not granted as of course. Special motions are either ex parte, or upon notice to the opposing party,[4] the method of giving which is a matter of statutory or judicial regulation, and need not be given here.[5]

A motion cannot be used to present anything to the court that is properly the subject of a pleading, but is confined to matters which are incidental to a presentation of the cause upon its merits.[6]

Petitions.

A petition is a written application to the court for the same objects, in general, as a motion; but it is a more formal presentation of the facts of the application,[7] is usually verified,[8] and may be

§§ 98–100. [1] 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1587; Shaft v. Insurance Co., 67 N. Y. 547.

[2] As to distinction between motions and petitions, see Lord Shipbrooke v. Lord Hinckinbrook, 13 Ves. 387, 393.

[3] See 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1591; Eq. Rules 4–6; U. S. v. Parrott, 1 McAll. 447, Fed. Cas. No. 15,999.

[4] See Fost. Fed. Prac. (2d Ed.) §§ 196, 197; Eq. Rule 55.

[5] The method generally followed seems to be by a service of a notice of the motion, accompanied by copies of the affidavits by which the application is supported, or by a notice alone, reciting and referring to the pleadings when the application is based on them alone. See Fost. Fed. Prac. (2d Ed.) § 197.

[6] See 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1603, 1604. See, also, Shaft v. Insurance Co., 67 N. Y. 544, 547; Jones v. Roberts, 12 Sim. 189.

[7] See 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1603–1610.

[8] Shaft v. Insurance Co., 67 N. Y. 544, 547.

made by one who is not a party to the record,—as in the case of a petition for intervention,—while a motion can be made only by a party.[9]

[9] Jones v. Roberts, 12 Sim. 189. See Barker v. Todd, 15 Fed. 265.

CHAPTER IV.

BILLS IN EQUITY.

101–103. Definition and Nature.
104. Classification of Bills.
105–106. Original Bills.
107–108. Original Bills Praying Relief.
109. Bills Involving a Determination of Rights Claimed in Opposition to Defendant.
110. Analysis of Bills.
111. Address or Direction.
112–113. Introduction.
114–116. Premises or Stating Part.
117. What must be Stated.
118. Privity.
119–120. Confederating Part.
121–123. Charging Part.
124–125. Averment of Jurisdiction.
126–129. Interrogating Part.
130–139. Prayer for Relief.
140–143. Prayer for Process.
144–148. Bills for Foreclosure of Mortgages.
149–152. Bills to Redeem.
153–155. Bills for Partition.
156–159. Bills to Quiet Title.
160. Bills of Peace.
161–163. Bills to Reform Instruments.
164–167. Bills for Specific Performance.
168–170. Bills to Set Aside Fraudulent Conveyances.
171–172. Bills for Infringement of Patents and Copyrights.
173–175. Creditors' Bills.
176–180. Bills of Interpleader.
181–183. Bills of Certiorari.
184–185. Original Bills not Praying Relief.
186–188. Bills to Perpetuate Testimony.
189. Bills to Examine Witnesses de Bene Esse.
190–191. Bills of Discovery.
192. Bills not Original—Definition and Classification.
193–194. Interlocutory Bills.
195–198. Supplemental Bills.
199–204. Bills of Revivor.
205–206. Bills of Revivor and Supplement.

207-208. Bills in the Nature of Original Bills.
209-214. Cross Bills.
215-220. Bills of Review.
221-222. Bills to Impeach Decrees for Fraud.
223. Bills to Suspend or Avoid the Operation of Decrees.
224-225. Bills to Effectuate or Carry out Decrees.
226. General Rules Governing the Bill—In General.
227-229. Sufficiency.
230-231. Certainty.
232. Consequences of Uncertainty.
233-234. Consistency and Directness.
235-239. Multifariousness.
240. Scandal.
241. Impertinence.
242. Consequences of Scandal or Impertinence.

DEFINITION AND NATURE.

101. A bill in equity is the written petition of the complainant to a court of equity, setting forth the facts upon which relief is sought, and formally praying that such relief be granted.

102. A bill in equity performs a twofold office:

(a) As a pleading, it is a statement of complainant's case and prays relief.

(b) As an examination of defendant, it seeks a discovery of facts upon which to base a decree.

103. The preparation and filing of the bill is the first proceeding in a suit in equity.

General Form and Structure of Ordinary Bills.

It has already been seen that the pleadings in an equitable suit are the formal method of presenting to the court the facts relied upon for complaint or defense in the particular case, in order that there may be a hearing of the cause on its merits, and a complete decree rendered defining and adjusting the rights of all persons interested.[1] The first of these pleadings, and, in one sense, the most important, is the bill or petition of the party seeking relief, and who is called the complain-

§§ 101-103. [1] See ante, p. 3.

ant, or the plaintiff, setting forth the facts of his case, and praying the interposition and decree of the court on his behalf on the facts shown, and because he is without adequate remedy at law.[2] Similar to the declaration at common law, it is the first pleading in the suit, but, unlike the former, it is also the first step in instituting the proceedings, no process being regularly issued until after it has been filed.[3]

The original writ, sued out at common law, requires the defendant to repair the injury complained of, or to appear in court and show cause to the contrary. The declaration afterwards is but an exposition or amplification of the writ. If the defendant contests the suit, he comes in and pleads. Proceedings in equity are commenced by a petition to the court to issue the writ of subpœna, to compel the defendant to appear and "answer concerning those things which shall be objected to him, and, further, to do and receive what the said court shall have considered in that behalf," which is the language of the writ. The petition must, therefore, state the cause of complaint as a ground for issuing the subpœna. Originally, when the defendant appeared on the subpœna, articles in writing were exhibited to him, containing such charges as he was required to answer upon oath; but it was found more convenient to insert such charges in the body of the petition itself, which was thence denominated a "bill in chancery."[4]

Generally speaking, the bill in equity is a petition to a court of equity, setting forth in detail the facts of a present or threatened grievance, to remedy or prevent which the aid of the court is invoked, and as to which the complainant has no adequate legal remedy, and formally praying for the relief sought. Strictly, it is a statement of facts show-

[2] See Lube, Eq. Pl. 1889, pp. 165, 166; Story, Eq. Pl. (10th Ed.) § 7; 1 Daniell, Ch. Pl. & Prac. (6th Ed.) § 374; Mitf. Eq. Pl. (by Jeremy), 7; Webster v. Harris, 16 Ohio, 490; Bailey v. Ryder, 10 N. Y. 363; Harding v. Handy, 11 Wheat. 103.

[3] See Eq. Rules 11, 12, which provide that no subpœna shall be issued in any suit in equity until the bill has been filed; after, it is to be issued as a matter of course. Aside from the eleventh rule, it seems that the issue of a subpœna before bill filed is irregular only, and the fault is waived by an appearance. In case of an injunction to stay waste, it may be issued before the bill is filed. See Crowell v. Botsford, 16 N. J. Eq. 459; Hayden v. Bucklin, 9 Paige (N. Y.) 512; Fitch v. Smith, 10 Paige (N. Y.) 9; Saxton v. Stowell, 11 Paige (N. Y.) 526.

[4] Lube, Eq. Pl. pp. 155, 156.

ing a case within the equitable jurisdiction of the court, and praying that the process of the court may issue to compel the defendant to appear and answer under oath to the statement made, to the end that relief may be granted according to the facts as stated.[5] In form, the object of a bill is to obtain a discovery upon oath from the defendant, and then to have such relief, grounded upon the defendant's admissions, or the complainant's proofs, as the court shall think proper.[6] It appears, therefore, that the bill performs a double function: First, it is a pleading, being a statement of complaint, similar to the declaration at common law; second, it is an examination of the defendant to obtain a discovery of facts necessary to a decree.[7] In this respect it differs from the declaration at common law, which is a pure pleading, confined to the single and simple point of charge and statement of injury, and this difference gives rise to important consequences.

So far as the bill is a mere pleading, it must set out the nature of the relation between the parties and the particular incidents which create the hardship which is the cause of complaint. It must state facts showing a case within the equitable jurisdiction of the court. This is the main body of the bill.[8]

[5] Lube. Eq. Pl. § 216.

[6] The statement of Lube (section 204), as to the objects of the bill in equity, is much broader than that given in the text, and regarded the bill as primarily contemplating a discovery in all cases as a condition precedent to obtaining any relief, and this view was probably well supported by the practice in chancery in times when discovery, as a remedial process of equity jurisdiction, was of much greater importance than in recent years; but it can hardly be said at the present time that discovery is the primary object of the bill, except in cases where the complainant may be under the necessity of obtaining all or some part of the proof necessary for his case from the defendant. With the general enactment of statutes making the defendant a competent witness, and in view of the dangerous practice of requiring a sworn answer which, if full and responsive, the complainant must accept as given, conditions have arisen under which, as a matter of practice, the oath to the answer is frequently dispensed with; and not only does it seem to be generally true that, under the modern procedure, discovery is generally incidental to the relief, but some important bills in equity, as those for the infringement of patents, copyrights, and trade-marks, often call for discovery that is to be effectual only after the complainant's right to relief has been established by an interlocutory decree.

[7] Lube, Eq. Pl. § 216.

[8] See Lube, Eq. Pl. 1889, § 224, et seq; 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.)

So far as the bill acts the part of an examination, it must state all such matters of inducement, and such collateral circumstances as may tend to extract a discovery, or which may raise a presumption of the truth of the principal statement, even if denied by the defendant. Should there be matter of avoidance, of which the defendant might avail himself, the bill, as an examination, should also contain charges to rebut the defense.[9]

It has already been observed that the bill is a petition to the court for a subpœna, or such other writ as the exigency of the case may require; and, accordingly, it concludes with a prayer in the usual form of petition, and stating the ends for which the writ is prayed, which are—first, that the defendant may answer the several distinct allegations of the bill, which are for that purpose usually repeated in an interrogative form; and, second, that the court may interpose with relief.[10]

CLASSIFICATION OF BILLS.

104. Bills in equity are divided into two classes, as follows:

(a) Original bills (p. 171).

(b) Bills not original (p. 289).

ORIGINAL BILLS.

105. Original bills are those which relate to some matter not before litigated in the court by the same persons, standing in the same interests.

106. Original bills are of two kinds:

(a) Bills praying relief (p. 173).

(b) Bills not praying relief (p. 283).

§ 361; Story, Eq. Pl. (10th Ed.) §§ 10, 28; White v. Yaw, 7 Vt. 357; Kunkel v. Markell, 26 Md. 408; Wright v. Dame, 22 Pick. (Mass.) 55; Thompson's Appeal, 126 Pa. St. 367, 17 Atl. 643. See, also, Comstock v. Herron, 45 Fed. 660; McCulla v. Beadleston, 17 R. I. 20, 20 Atl. 11; Stevens v. Hayden, 129 Mass. 328. See, also, post, p. 193.

[9] See post, p. 205, "Charging Part."

[10] Lube, Eq. Pl. § 216.

Bills vary in their form and denomination according to the objects for which they are exhibited. Those which bring any matter before the consideration of the court for the first time are called "original bills." [1] Any other bills which may be filed during the progress, or even after the termination, of a suit, are termed, by way of distinction, "bills not original." [2] Included in the class of bills not original, but sometimes treated as a separate class, are bills in the nature of original bills.[3]

Original bills may be divided into those which pray relief [4] and those which do not pray relief.[5] In a general sense, all bills in equity may be said to pray relief, since they seek the aid of the court, by some decree or decretal order, to remedy some existing or apprehended wrong or injury. But, in the sense in which the words are used in courts of equity, such bills only are deemed bills for relief as seek from the court in that very suit a decision upon the whole merits of the case set forth by the plaintiff, and a decree which shall ascertain and protect present rights or redress present wrongs. All other bills, which merely ask the aid of the court against possible future injury, or to support or defend a suit in another court of ordinary jurisdiction, are deemed bills not for relief.[6] "In a general sense, every bill in equity asks relief, but those bills only are so called, in technical language, which seek an adjustment of the matter in controversy in that suit. Bills of discovery, and bills to perpetuate the testimony of witnesses, are not considered as belonging to this class, their whole object being to obtain the means of prosecuting or defending some right, in another forum and

§§ 104–106. [1] "Original bills are those which relate to some matter not before litigated in the court by the same persons, standing in the same interests." Story, Eq. Pl. § 16. See, also, Butler v. Cunningham, 1 Barb. (N. Y.) 85.

[2] "Bills not original are those that relate to some matter already litigated in the court by the same persons, and which are either an addition to, or a continuance of, an original bill, or both." Story, Eq. Pl. § 16; Coop. Eq. Pl. 43. See, also, post, p. 289.

[3] See post, p. 303. "There is another class of bills, which is of a mixed nature, and sometimes partakes of the character of both the others. Thus, for example, bills brought for the purpose of cross litigation, or of controverting, or suspending, or reversing some decree or order of the court, or of obtaining the benefit of a former decree, or of carrying it into execution, are not considered as strictly a continuance of the former bill, but in the nature of original bills." Story, Eq. Pl. § 16.

[4] See post, p. 173. [5] See post, p. 283. [6] Story, Eq. Pl. § 17.

at a future time." [7] This distinction is not merely formal, but may involve very important consequences, for, if a complainant should by mistake pray for relief, his bill may be demurrable.[8]

ORIGINAL BILLS PRAYING RELIEF.

107. Original bills praying relief are bills which bring a matter before the consideration of the court for the first time, and seek an adjustment of the controversy in that very suit.

108. Original bills praying for relief may be divided into three classes:

(a) Bills praying the decree or order of the court, touching some right claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the complainant's right (p. 173).

(b) Bills of interpleader (p. 277).

(c) Bills of certiorari (p. 282).

SAME—BILLS INVOLVING A DETERMINATION OF RIGHTS CLAIMED IN OPPOSITION TO DEFENDANT.

109. The principal instances of the first class of original bills praying relief are the following:

(a) Bills to foreclose mortgages (p. 237).

(b) Bills to redeem (p. 241).

(c) Bills for partition (p. 244).

(d) Bills to quiet title (p. 248).

(e) Bills to reform instruments (p. 256).

(f) Bills for specific performance (p. 259).

(g) Bills to set aside fraudulent conveyances (p. 264).

(h) Bills for infringement of patents (p. 269).

(i) Creditors' bills (p. 273).

[7] Bart. Suit in Eq. p. 42.

[8] Story, Eq. Pl. §§ 17, 312. See, also, post, p. 285.

Original bills praying relief of the first class, i. e. bills praying the decree or order of the court touching some right claimed by the party exhibiting the bill in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the plaintiff's right, are the most usual form of bill exhibited in courts of equity, and for this reason, as well as because they more fully illustrate the general principles of pleading adopted in those courts, they will first be considered. The subject will be discussed in the following order: First, considerations common to all bills of this class will be presented, consisting of the analysis of a bill into its formal parts, and an explanation of the structure of each part and the purpose it is intended to subserve; second, some particular kinds of bills of this class will be considered, showing the applications of the foregoing principles.

The above enumeration is given as covering the most important classes of cases in which original bills praying relief, either in the establishment or enforcement of a real or supposed right, or the redress of an injury done or threatened to such right, may be brought. Other instances might be given, but those mentioned will be sufficient, it is conceived, when examined in connection with the general requisites of a bill in equity, to properly illustrate the application of the governing principles to given cases, as the structure of all bills in this, though the most important class, is essentially the same. In stating what the bill, in each case, must essentially contain, the stating part and prayer for relief will cover the distinguishing features of each. The discussion, in connection with the analysis of a bill, is applicable to all of the above-enumerated classes of bills, and will be sufficient to show their formal structure.

110. ANALYSIS OF BILLS—A bill in equity may be composed of nine distinct parts or elements, as follows:

(a) **The address of the bill** (p. 183).

(b) **The introduction** (p. 183).

(c) **The premises or stating part** (p. 186).

(d) **The confederating part** (p. 204).

(e) **The charging part** (p. 205).

(f) **The averment of jurisdiction** (p. 211).

(g) The interrogating part (p. 212).
(h) The prayer for relief (p. 220).
(i) The prayer for process (p. 233).

Bills in equity were originally very simple in their construction. "Formerly," said Lord Eldon,[1] "a bill contained very little more than the stating part. I have seen such a bill, with a simple prayer that the defendant may answer all the matters aforesaid, and then the prayer for relief." [2] Eventually, however, the bill in equity became an elaborate and complicated document, composed of the nine distinct parts above enumerated.[3] The above analysis is that of Lord Redes-

§ 110. [1] Partridge v. Haycraft, 11 Ves. 570, 574.

[2] "This statement and this prayer constituted the whole of the bill, and continued to do so until a comparatively modern period of time, although it is difficult to fix the exact time when additions began to be made to it." Story, Eq. Pl. (10th Ed.) § 12.

[3] "Still, however, the statement of the case, and prayer of the bill for relief or otherwise, always were, and continue to be to this day, the very substance and essence of the bill. The other parts have indeed their appropriate uses and functions; and, when skillfully drawn and judiciously applied, become the means of eliciting the truth, and often of saving much delay and inconvenience and expense to the parties." Story, Eq. Pl. § 12. See, also, the views of Mr. Bell, an eminent counsel in chancery, reported in Story, Eq. Pl. §§ 38, 46, notes. Speaking of the nine formal parts of a bill, Lord Redesdale has remarked: "Some of them are not essential, and, particularly, it is in the discretion of the person who prepares the bill to allege any pretense of the defendant in opposition to the plaintiff's claims, or to interrogate the defendant specially. The indiscriminate use of these parts of a bill in all cases has given rise to a common reproach to practicers in this line, that every bill contains the same story, three times told. In the hurry of the business, it may be difficult to avoid giving ground for the reproach; but, in a bill prepared with attention, the parts will be found to be perfectly distinct, and to have their separate and necessary operations." Mitf. Eq. Pl. (by Jeremy) 47. See, also, Coop. Eq. Pl. 17, 18. The editor of the eighth edition of Story's Equity Pleading, Mr. Redfield, ventures the following suggestions in regard to the proper mode of drawing bills: "From what has been said, it will occur to all that any strict and slavish adherence to the systematic insertion, in every bill in equity, of the precise nine parts of the bill, pointed out by the elementary writers, would be far from judicious or allowable; since, in the majority of plain cases, nothing more than the careful statement of the facts of the case, the general prayer that the defendant may answer the bill, and for relief, will be required; while in more complicated cases, and especially where the defendants are suspected of combination and confederation, it may be important to present, on the face

dale,[4] and is followed by our own Story.[5] Lubé[6] has criticised it as illogical and misleading, but it does not seem necessarily so. All confusion will be avoided by remembering that distinct paragraphs or periods are not necessarily indicated, but only the analytical parts of the bill, and that any bill need only contain in substance what is included in the various parts. Indeed, the only substantial change in analysis suggested by Mr. Lubé is the consolidation of the last four parts above enumerated, viz. the averment of jurisdiction, the interrogating part, the prayer for relief, and the prayer for process, into one part. His reason for this is that these four parts constitute but a single sentence.[7] This fact being recognized,

of the bill, some of the pretenses set up in defense or evasion of the claim, and in many cases to extend the interrogatories into minute detail, in order to lay the proper ground for exceptions, if the answers should prove evasive, and sometimes it may serve to guide the mind of the court towards the correct appreciation of the plaintiff's claim to relief, if the special prayers for such relief were considerably amplified. We think practitioners fail of making the proper impression upon the mind of the court, both by too much brevity, and by too great prolixity of detail. Here, as everywhere, in medio tutissimus ibis." Story, Eq. Pl. (8th Ed.) § 48a. "The averments of the answer to which exceptions are taken are in response to these wholesale charges, with reference to which the respondents have a right to vindicate themselves. It was said, in substance, upon the argument, that there was no intention to reflect upon the respondents, and that the bill was drawn in accordance with approved forms, and it was insisted that the averments of the answer excepted to did not touch the merits of the cause, which was not intended to be adversary, but merely for the construction of the will and the ascertainment of the rights of the complainant. Nevertheless the averments are in the bill, and, being there, the respondents have a right to answer them fully. Originally a bill in equity consisted of nine parts, of which there were five principal parts, to wit, the statement, the charges, the interrogatories, the prayer of relief, and the prayer of process. But all these, according to more recent authorities, may be dispensed with excepting the stating part and the prayer for relief; for as Langdell in his handbook on Equity Pleading states: 'All that was ever essential to a bill was a proper statement of the facts which the plaintiff intended to prove, a specification of the relief which he claimed, and an indication of the legal grounds of such relief,'—section 55." Comstock v. Herron, 45 Fed. 660.

[4] Mitf. Eq. Pl. (5th Ed.) 49.

[5] Eq. Pl. §§ 26–46.

[6] Eq. Pl. § 221.

[7] Lube, Eq. Pl. §§ 216–221. See, also, the example of a bill given in the text, post, p. 177.

however, no confusion results from its further subdivision for convenient discussion. The sentence as a whole, however, merits a little further consideration. There is a considerable inversion in its form. It begins with the jurisdiction clause by formally setting out the reasons for applying to the court, viz.: "In consideration whereof (i. e. the wrong and injury complained of), and forasmuch as your orator is without remedy at the common law, and cannot have adequate relief but in a court of equity," etc. In natural sequence, this clause would be followed by the prayer for a subpœna commanding the defendant to appear, "to the end that" he may answer the allegations and interrogatories of the bill, and be decreed by the court to perform such acts as may be proper. But just here is an inversion, the clause beginning, "to the end," etc., being put before the prayer for the subpœna, "may it please," etc. "The want of sufficient attention to this point, coupled with the circumstance of the extreme length of the sentence, the whole statement and charge of the bill being here repeated in the form of interrogation, and the prayer for particular relief being also included, has occasioned great perplexity in the mind of many a pupil, and in not a few instances has prevented him from ever arriving at the knowledge of the true bearing and connection of the several members of this complicated sentence." [8]

There is a tendency towards simplification of bills in equity. As will be seen, when the nine parts of a bill are examined in detail, some of them are unnecessary, but it will be convenient, for purposes of analysis, to retain the ancient division.[9]

Ancient Form of an Original Bill.[10]

1. THE ADDRESS OF THE BILL.

"To the Right Honorable Edward Lord Thurlow, Baron Thurlow of Ashfield, in the County of Suffolk, Lord High Chancellor of Great Britain:

2. THE INTRODUCTION.

"Humbly complaining, showeth unto your lordship, your orator, James Willis (son of John Willis, of Babbington, in the county of Es-

[8] Lube, Eq. Pl. § 221. This inverted form of sentence need not be retained in a modern bill. Each of its clauses may be represented by a separate sentence, complete in itself. See form of bill in United States courts given in text, p. 180.

[9] See note 3, supra.

[10] The form here given is taken from Bart. Suit in Eq. p. 51.

sex), an infant under the age of 21 years, to wit, of the age of six years or thereabouts, by his said father, and next friend, and Samuel Dickinson, of," etc.

3. The Premises or Stating Part.

"That Thomas Atkins, Esq., of Taunton, of the county of Somerset, being seised and possessed of a considerable real and personal estate, did, on or about the fourth day of March, in the year of our Lord 1742, duly make and publish his last will and testament, in writing; and thereby amongst other things devised and bequeathed as follows [here are recited such parts of the will as constituted the bequest, which was of eight hundred pounds]; and that the said testator departed this life on or about the 20th day of December, 1748, and upon or soon after the death of the said testator, to wit, on or about the 8th day of January, 1750, the said Edward Willis and William Willis duly proved the said will in the prerogative court of the archbishop of Canterbury, and took upon themselves the burden and execution thereof; and accordingly possessed themselves of all the said testator's real and personal estate, goods, chattels, and effects, to the amount of fifteen hundred pounds and upward. And your orator further showeth that he has, by his said father and next friend, at various times, since his said legacy of eight hundred pounds became due and payable, applied to the said Edward Willis and William Willis, requesting them to pay the same for the benefit of your orator; and your orator well hoped that they would have complied with such request, as in conscience and equity they ought to have done.

4. The Confederating Part.

"But now so it is, may it please your lordship, that the said Edward Willis and William Willis, combining and confederating together, to and with divers other persons, as yet unknown to your orator (but whose names, your orator prays, when discovered, may be inserted herein as defendants and parties to this suit, with proper and sufficient words to charge them with the premises), in order to oppress and injure your orator, do absolutely refuse to pay, or secure for your orator's benefit, the legacy of eight hundred pounds aforesaid, or any part thereof; for reason whereof the said confederates sometimes allege and pretend that the testator made no such will, nor any other will, to the effect aforesaid; and at other times they admit such will to have been made by the said testator, and that they proved the same, and possessed themselves of his real and personal estate, but then they pretend that the same was very small and inconsiderable, and by no means sufficient to pay and satisfy the said testator's debts, legacies, and funeral expenses, and that they have applied and disposed of the same toward satisfaction thereof; and at the same time the said confederates refuse to discover and set forth what such real and personal estate really was, or the particulars whereof the same consisted, or the value thereof, or how much thereof they have so applied, and to whom, and for what, or how the same has been disposed of particularly.

5. The Charging Part.

"Whereas, your orator chargeth the truth to be that the said testator died possessed of such real and personal estate, to the full value aforesaid; and that the same was much more than sufficient to pay all the just debts, legacies, and funeral expenses of the said testator; and that the said confederates, or one of them, have possessed and converted the same to their own uses, without making any satisfaction to your orator for his said legacy,—all which actings, pretenses, and doings of the said confederates are contrary to equity, and tend to the manifest injury and oppression of your orator.

6. The Averment of Jurisdiction.

"In tender consideration whereof, and for that your orator is remediless by the strict rules of the common law, and relievable only in a court of equity, where matters of this nature are properly cognizable.

7. The Interrogating Part.

"To the end, therefore, that the said confederates may, respectively, full, true, direct, and perfect answer make upon their respective corporal oaths, according to the best of their respective knowledge, information, and belief, to all and singular the charges and matters aforesaid, as fully in every respect as if the same were here again repeated, and they thereunto particularly interrogated; and more especially that they may respectively set forth and discover, according to the best of their knowledge, information, and belief, whether the said testator, Thomas Atkins, duly made and published such last will and testament in writing of such date, and of such purport and effect aforesaid, and thereby bequeathed to your orator such legacy of eight hundred pounds aforesaid, or any other, and what last will and testament, of any other, and what date, and to any other, and what purport and effect, particularly; and that they may produce the same, or the probate thereof, to this honorable court, as often as there shall be occasion; and whether by such will, or any other, and what will, the said testator appointed any, and what other, executor by name; and when the said testator died, and whether he revoked or altered said will before his death, and when, before whom, and in what manner; and whether the said confederates, or one of them, and which of them, proved the said will, and when, and in what court; and that they may respectively set forth whether your orator, by his said father and next friend, hath not several times, since his said legacy became due and payable, applied to them to have the same paid, or secured for his benefit, to that purpose and effect, or how otherwise; and whether the said confederates, or one, and which of them, refused and neglected to comply with such requests, and for what reasons, respectively, and whether such refusal was grounded on the pretenses hereinbefore charged, or any, and which of them, or any other, and what pretenses particularly; and that the said confederates may admit assets of the said testator, come to their hands, sufficient to satisfy your orator's said legacy, and subject to the payment thereof; and that,

etc. (requiring a full statement of effects come to their hands, and the disposal thereof, etc., that the plaintiff may show he has a right to the payment of his legacy, in case it should be controverted).

8. PRAYER FOR RELIEF.

"And that the said confederates may be compelled, by a decree of this honorable court, to pay your orator's said legacy of eight hundred pounds, and that the same may be placed out at interest, for your orator's benefit, until your orator attains the age of twenty-one years, and that the said eight hundred pounds may then be paid him; and that, in the meantime, the interest thereof may be paid to your orator's said father, toward the maintenance and education of your orator; and that your orator may have such further and other relief in the premises as the nature of his case shall require and as to your lordship shall seem meet.

9. PRAYER FOR PROCESS.

"May it please your lordship to grant unto your orator his majesty's most gracious writ or writs of subpœna, to be directed to the said Edward Willis and William Willis, and the rest of the confederates, when discovered, thereby commanding them, and every of them, at a certain day, and under a certain pain, therein to be specified, personally to be and appear before your lordship in this honorable court; and then and there to answer all and singular the premises aforesaid, and to stand to perform and abide such order, direction, and decree therein as to your lordship shall seem meet; and your orator shall ever pray. A. MANNING."

Modern Form of Bill in Federal Court.[11]

The preceding bill, framed in accordance with the United States equity Rules, is as follows. The division into parts is not indicated, as, of course, it never is in actual bills:

In the Circuit Court of the United States,
District of Massachusetts.

James Willis, an Infant, by John Willis, his Next Friend, Complainant,	
vs.	In Equity. May Term.
Edward Willis and William Willis, Respondents.	

"To the Judges of the Circuit Court of the United States for the District of Massachusetts:

"James Willis, a resident of the city of New York, and a citizen of the state of New York, an infant under the age of twenty-one

[11] The form here given is taken from Bart. Suit in Eq. (Holc. Am. Ed.) p. 56

years, by his father and next friend, John Willis, a resident of the same city and a citizen of the same state, brings this, his bill, against Edward Willis and William Willis, who are both residents of the city of Boston, and citizens of the state of Massachusetts.

"And thereupon your orator complains and says that one Thomas Atkins, of the city of Boston, being seised and possessed of a considerable real and personal estate, did, on or about the fourth of March, 1820, duly make and publish his last will and testament in writing; and thereby, amongst other things, bequeathed and devised to your orator, James Willis, the sum of eight hundred dollars ($800), and appointed the above-named defendants, Edward Willis and William Willis, executors of his said last will and testament. Your orator further states that the said testator departed this life on or about the 20th of December, 1822; and soon after the death of said testator, to wit, on the 8th of January, 1823, the defendants, Edward Willis and William Willis, duly proved the said will in the probate court of the city of Boston, and took upon themselves the burden and execution thereof; and accordingly possessed themselves of the testator's real and personal estate, amounting to the sum of five thousand dollars ($5,000) and upward. And your orator further says that he has, by his father and next friend, John Willis, applied to the defendants, Edward and William Willis, at various times, since his said legacy became due and payable, to pay the same for your orator's benefit; but they have absolutely refused to pay or secure for your orator's benefit the aforesaid legacy, or any part thereof, pretending and alleging that the estate of their testator, both real and personal, was insufficient to discharge his debts, and that they have exhausted the whole of the estate which has come into their hands in paying such debts; whereas, your orator charges the truth to be that the estate of the testator was fully equal in value to the sum which was before mentioned, viz. $5,000, and that his debts were small and trifling in comparison with that amount, and that these defendants have converted the property of their testator to their own use, without making any satisfaction to your orator for his legacy.

"To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer; that is to say:

"(1) Whether it is not a fact that the aforesaid Thomas Atkins did duly make and publish his last will and testament, and therein bequeathed to your orator a legacy of eight hundred dollars ($800);

"(2) Whether it is not a fact that the said Thomas Atkins, in said last will and testament, appointed them, the said William Willis and Edward Willis, to be executors of the same;

"(3) Whether it is not a fact that the said testator died without revoking said last will and testament, but in fact leaving the same in full force;

"(4) Whether it is not a fact that the said defendants, or one of them, proved the said will in the probate court of the city of Boston, in due form of law, and took upon themselves the execution thereof;

"(5) Whether it is not a fact that they have possessed themselves of the real and personal estate, goods, chattels, and effects, of the said Thomas Atkins, deceased;

"(6) Whether it is not a fact that assets of said testator have come into their hands more than sufficient to discharge their just debts;

"(7) Whether it is not a fact that they, and each of them, have refused to pay the legacy bequeathed to your orator, and that it yet remains wholly unpaid;

—"Your orator prays that the said defendants may be compelled to render a full and perfect account of the estate, goods, chattels, and effects of the said Thomas Atkins, deceased, the value thereof, the debts due by said decedent, and to whom they have been paid or are payable, the debts due to said testator, and which of the same have been paid to said executors, and all other matters and things concerning the condition of said estate; and that this they may do upon their corporal oaths, to the best of their respective knowledge, information, and belief.

"Your orator further prays that the said defendants may be compelled to pay the legacy bequeathed to your orator of $800 by the said Thomas Atkins, and that the same may be placed at interest for the benefit of your orator, until he attains the age of 21 years, and then paid over to him; and that in the meantime the interest thereof be paid to your orator's father, to be applied to the support and maintenance of your orator; and that your orator shall have generally such other and further relief as the nature of his case may require.

"Therefore will your honors grant unto your orator the writ of subpœna, issuing out of and under the seal of this court, to be directed to said defendants, Edward Willis and William Willis, commanding them, and each of them, by a certain day, and under a certain penalty, therein inserted, to appear before your honors, in the circuit court of ———, and then and there answer the premises, and abide the order and decree of the court.

"J. PENDLETON, Sol. for Plff.

"Note. The defendant Edward Willis and the defendant William Willis are each required to answer the interrogatories numbered, respectively, 1, 2, 3, 4, 5, 6, 7."

111. THE ADDRESS, OR DIRECTION—The address or direction of a bill is the formal reference to, and should contain the appropriate and technical description of, the court in which the complainant seeks relief.

This is a purely formal part of the bill, following next after the title or caption, as shown in the preceding example, and requires but little notice. While its form is usually that which has been given, it is not arbitrary, though in any case the bill should be addressed to the proper court.[1] The consequences of an error or omission in this respect would seem to be doubtful, but in any case, it is conceived, an amendment would be allowed if objection were taken.

112. THE INTRODUCTION—The introduction of a bill contains the names and places of abode of the parties exhibiting it, the character in which they sue, and such other description as may be necessary to found the jurisdiction of the court.

113. In the federal courts, the equity rules require a similar description of the defendants.

The second part of the bill is called the "introduction." It immediately follows the address to the court, and must contain a correct designation and description of all persons appearing as complainants, giving their names, places of abode, the character in which they sue, if they sue in autre droit, and such other descrip-

§ 111. [1] In the circuit court of the United States the direction should be as follows: "To the Judges of the Circuit Court of the United States for the District of ——." See U. S. Eq. Rule 20. A bill addressed, "To the Circuit Court in Chancery Sitting," is sufficiently addressed, under the rule. Sterrick v. Pugsley, 1 Flip. 350, Fed. Cas. No. 13,379. In New York, under the old chancery practice, the address would be, "To the Honorable James Kent, Chancellor of the State of New York." Blake, Ch. Prac. 27. In Barb. Ch. Prac., it is said the address should be, "To the Chancellor of the State of New York," without the addition of his name or any other title or designation. See page 35. By the twentieth equity rule the address of a bill in the circuit court is included in the introductory part.

tion as may be necessary and proper to found the jurisdiction of the court.[1] These statements are material, both to fix the identity of the parties and to enable the defendant to resort to the complainant for the payment of costs, or compliance with any other order which may be made during the progress of a cause.[2] In this part, also, are sometimes contained the names and appropriate descriptions of the parties made defendants, although they are now usually found in the next succeeding part.[3] In the federal courts, however, the

§§ 112–113. [1] Story, Eq. Pl. § 26; Swan v. Porter, Hardr. 60; Albretcht v. Sussmann, 2 Ves. & B. 323; Griffith v. Ricketts, 5 Hare, 195; Sibbering v. Earl of Balcarras, 1 De Gex & S. 683. "Description is not in pleading equivalent to averment. And it was not necessary, in setting forth in the beginning of the bill who the plaintiffs were, to explain in the same breath their connection with, or relation to, the matters in respect of which the suit was brought. That is the office of the stating part or premises of the bill, which should contain 'a clear and orderly statement of the facts on which the suit is founded, without prolixity or repetition.' Code 1876, § 3761." Savannah & M. R. Co. v. Lancaster, 62 Ala. 555, 561. The description of minor plaintiffs need not state their age. Stewart v. Chadwick, 8 Iowa, 463. In Ransom's Ex'rs v. Geer, 30 N. J. Eq. 249, it was held that when a bill in its premises sets forth sufficient facts to show that the complainant is entitled to relief as an executor, or that the defendant is liable as an executor, it is not necessary that either should be so styled in the commencement or conclusion of the bill. The description of an executor as "personal representative" is insufficient. Capehart v. Hale, 6 W. Va. 547. "It appears to be laid down in all the books upon chancery pleading that the residence or abode of the complainant should be stated in the bill, though by the practice in this state a particular description of his calling or business does not appear to be necessary. The object of setting forth the residence of the complainant is stated to be that the court and the defendant in the suit may know where to resort to compel obedience to any order or process of the court, and particularly for the payment of any costs which may be awarded against such complainant, or to punish him for any improper conduct in the course of the suit." Howe v. Harvey, 8 Paige (N. Y.) 74. See Winnipissiogee Lake Co. v. Worster, 29 N. H. 433. The description of one simply "of Philadelphia" is insufficient for failure to name the state. Jackson v. Ashton, 8 Pet. 148.

[2] Bart. Suit in Eq. 43; Story, Eq. Pl. § 26. The usual description of the plaintiff is: "Your orator, A. B., of ——, in the county of ——, and state of ——, esquire." Story, Eq. Pl. p. 21, § 26, note 2.

[3] Story, Eq. Pl. 26. Parties cannot be designated by fictitious names. Kentucky Silver Min. Co. v. Day, 2 Sawy. 468, Fed. Cas. No. 7,719. Parties should be described, if known, by their proper names. Kirkham v. Justice, 17 Ill. 107. That provision of the chancery act which declares that in suits to obtain

equity rules require such description of defendants to be given in the introduction. Rule 20 is as follows: "Every bill in the introductory part thereof shall contain the names, places of abode, and citizenship of all the parties plaintiffs and defendants by and against whom the bill is brought. The form, in substance, shall be as follows: 'To the Judges of the Circuit Court of the United States for the District of ———: A. B., of ———, and a citizen of the state of ———, brings this his bill against C. D., of ———, and a citizen of the state of ———, and E. F., of ———, and a citizen of the state of ———; and thereupon your orator [4] complains, and says that,' etc." [5] In cases where the jurisdiction of the federal court is founded on the diverse citizenship of the parties, the allegation of citizenship of the parties is jurisdictional, and, if it is omitted, the bill is demurrable, for the jurisdiction of the court must appear affirmatively upon the record.[6] The form of the allegation prescribed in the above rule would probably answer as well in a state court, though the allegation of citizenship would not generally, in such case, be jurisdictional.

Where the bill is filed on behalf of an infant or married woman by a next friend, the description and place of abode of the next friend

title to land unknown parties may be joined by the description of unknown owners cannot be employed as a mode for joining persons in interest who are known to the complainant. Wellington v. Heermans, 110 Ill. 564. Persons whose names and places of residence are easily obtainable cannot be made parties as unknown heirs. Seymour v. Edwards, 31 Ill. App. 50.

[4] The plaintiffs are commonly called in the bill by the title of "your orators" or "oratrixes," according to their sex.

[5] See Story, Eq. Pl. § 26; Dodge v. Perkins, 4 Mason, 435, Fed. Cas. No. 3,954; U. S. v. Pratt Coal & Coke Co., 18 Fed. 708. A similar rule prevails in New Hampshire. See Ch. Rule 2, 38 N. H. 605. A similar rule prevails in Florida. See McCoy v. Boley, 21 Fla. 803; Keen v. Jordan, 13 Fla. 327. Code Tenn. 1884, § 5056, requires the address of the bill to be followed by the names and residences of the party. See Grubbs v. Colter, 7 Baxt. (Tenn.) 432; Walker v. Cottrell, 6 Baxt. (Tenn.) 257, 271.

[6] Heard, Eq. Pl. pp. 21, 22; Bingham v. Cabot, 3 Dall. 382; Jackson v. Ashton, 8 Pet. 148. The bill must show that plaintiffs and defendants are citizens of different states. Vose v. Philbrook, 3 Story, 335, Fed. Cas. No. 17,010; Dodge v. Perkins, 4 Mason, 435, Fed. Cas. No. 3,954; Manufacturers' Nat. Bank v. Baack, 8 Blatchf. 137, Fed. Cas. No. 9,052; Merserole v. Collar Co., 6 Blatchf. 356, Fed. Cas. No. 9,488. Domicile should be averred. Harrison v. Nixon, 9 Pet. 483, 505.

must be given, and that of the infant or married woman is immaterial.[7]

The consequences of a defect in this part of the bill are somewhat doubtful.[8] Where the allegation of citizenship is jurisdictional, if such averment is insufficient or entirely omitted the bill is demurrable.[9] Where the averment is omitted, the bill may be dismissed by the court of its own motion.[10] It may also be observed here that the caption or title of the bill is not properly a part of it, and therefore cannot aid a defective statement in the introduction.[11]

114. THE PREMISES OR STATING PART — The third formal part of a bill is variously called the premises, the stating part, or the narrative part. It performs and is properly limited to the function of a bill as a pleading. It consists of the statement of complainant's cause of action.

115. The statement must allege the existence of every fact necessary to entitle the complainant to equitable relief. It must be complete in itself, and cannot be aided or enlarged by reference to other parts of the bill.

116. The complainant can recover only upon the cause of action stated, and the sufficiency of defendant's plea will be determined by reference to this part of the bill.

[7] Heard, Eq. Pl. p. 22; Daniell, Ch. Pl. & Prac. (5th Am. Ed.) 359.

[8] Howe v. Harvey, 8 Paige (N. Y.) 73; Daniell, Ch. Pl. & Prac. (5th Am. Ed.) 358; Simpson v. Burton, 1 Beav. 556; Story, Eq. Pl. p. 21, § 26, note 2. In Winnipissiogee Lake Co. v. Worster, 29 N. H. 433, it was held that a defect in a bill in giving the description of the parties, or improperly setting forth residences or places of doing business, must be taken advantage of by demurrer or by plea in the nature of a plea in abatement.

[9] Winnipissiogee Lake Co. v. Worster, 29 N. H. 433, 444; Winnipiseogee Lake Co. v. Young, 40 N. H. 420.

[10] See Emory v. Grenough, 3 Dall. 369; Bingham v. Cabot, Id. 382; Jackson v. Ashton, 8 Pet. 148.

[11] In Jackson v. Ashton, 8 Pet. 148, the bill was dismissed for want of jurisdiction, on the ground that it did not state the citizenship of the parties, although this was distinctly recited in the caption, and although the defendant offered to waive objection.

The stating or narrative part of the bill is of the utmost importance, as it is the statement of the complainant's cause of action, and upon its sufficiency and completeness depends his right to the relief sought. In general, it must contain every averment necessary to entitle him to the relief prayed for, and must state a case which, whether admitted by the defendant or established by proof at the trial, will be one upon which the court can properly render its decree.[1] If defective, it cannot be aided by reference to other

§§ 114–116. [1] Harrison v. Nixon, 9 Pet. 483; Fox v. Pierce, 50 Mich. 500, 15 N. W. 880; Wright v. Dame, 22 Pick. (Mass.) 55; Freichnecht v. Meyer, 39 N. J. Eq. 551. In Smith v. Wood, 42 N. J. Eq. 563, 7 Atl. 881, the court said: "No rule of equity pleading is better settled than that which declares that every material fact which it is necessary for a complainant to prove to establish his right to the relief he asks must be alleged in the premises of his bill with reasonable fullness and particularity. A suitor who seeks relief on the ground of fraud must do something more than make a general charge of fraud. He must state the facts which constitute the fraud, so that the person against whom relief is sought may be afforded a full opportunity, not only to deny or explain the facts charged, but to disprove them. He has a right to know in advance just what he will be required to meet." The bill must allege every fact necessary to establish plaintiff's right to the relief asked for, and in a well-drawn pleading these will be contained in the stating part. Wright v. Dame, 22 Pick. (Mass.) 55; Fox v. Pierce, 50 Mich. 500, 15 N. W. 880; Bangs v. Stephenson, 63 Mich. 661, 30 N. W. 317; Smith v. Wood, 42 N. J. Eq. 566, 7 Atl. 881; Consolidated Electric Storage Co. v. Atlantic Trust Co., 50 N. J. Eq. 93, 24 Atl. 229; Campbell v. Powers, 139 Ill. 128, 28 N. E. 1062; Short v. Kieffer, 142 Ill. 258, 31 N. E. 427; Gage v. Abbott, 99 Ill. 366; Amy v. Manning, 149 Mass. 146, 21 N. E. 943; Nichols v. Rogers, 139 Mass. 146, 29 N. E. 377; Wingo v. Hardy, 94 Ala. 184, 10 South. 659; Shepard v. Shepard, 6 Conn. 37; Mercantile Trust Co. v. Kanawha & O. R. Co., 39 Fed. 339; Marshall v. Turnbull, 34 Fed. 827; St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 577, 10 Sup. Ct. 390; Hobart v. Andrews, 21 Pick. (Mass.) 534; Freichnecht v. Meyer, 39 N. J. Eq. 551; Bushnell v. Avery, 121 Mass. 148; Thompson's Appeal, 126 Pa. St. 367, 17 Atl. 643; Rice v. Hosiery Co., 56 N. H. 114. Relief cannot be granted upon a bill not containing the requisite allegations, even though it be taken pro confesso. Strother v. Lovejoy, 8 B. Mon. (Ky.) 135; McMahon v. Rooney, 93 Mich. 390, 53 N. W. 539; Danner v. Brewer, 69 Ala. 191. A bill seeking relief in equity must contain all the necessary allegations, and the proofs must correspond with and support the allegations. A defect for want of proper allegations is not at all obviated by the statement that the facts "will more fully appear by the proof." Briant v. Corpening, Phil. Eq. (N. C.) 325. The bill should show affirmatively a case for relief. Cage v. Abbott, 99 Ill. 366. The rule as to form in pleadings is not as stringent in equity as at law, but the substance

parts of the bill,[2] nor can the want of necessary allegations be supplied by inference;[3] and the necessity for accuracy and complete-

of the rules is the same in each court; and it is a principle of universal application in pleading, founded on reason and good sense, that the plaintiff's title should be stated with sufficient certainty and clearness to enable the court to see plainly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the case which he is called upon to defend. Cockrell v. Gurley, 26 Ala. 405. A bill which fails to state the right, title, or claim on which complainant relies for relief, with accuracy and clearness, is demurrable. West v. Reynolds, 35 Fla. 317, 17 South. 740.

[2] Cowles v. Buchanan, 3 Ired. Eq. 374; Clayton v. Earl of Winchelsea, 3 Younge & C. 683; Thompson's Appeal, 126 Pa. St. 367, 17 Atl. 643. Matters essential to complainants' title and right to relief must be shown by clear and unambiguous averments in the stating part of the bill; and though, on demurrer, the court might not feel bound to refuse, it cannot be required to seek explanation of a defective allegation in the stating part of the bill, by reference to a clear averment of the same matter in a subsequent part. Savannah & M. R. Co. v. Lancaster, 62 Ala. 555; Wright v. Dame, 22 Pick (Mass.) 55. If the stating part of a bill shows no ground for an account, a prayer for an account does not entitle the plaintiff to maintain the bill. The stating part of the bill cannot be enlarged by the terms of the prayer for relief. Bushnell v. Avery, 121 Mass. 148. See, also, White v. Jeffers, 1 Clarke, Ch. (N. Y.) 206, 208. As to effect of statement by way of charge, see post, p. 205. "Charging Part." By referring in the bill to a deed or other written instrument as follows: "As in and by the said indenture, reference being thereunto had, when produced, will more fully and at large appear."—the whole document referred to is made a part of the record, and the complainant may avail himself of any portion thereof. Swetland v. Swetland, 3 Mich. 482. See, also, Moore v. Titman, 33 Ill. 357.

[3] Facts essential to the complainant's title to maintain his bill and obtain the relief must be alleged positively, and cannot be inferred from other facts stated. Manning v. Drake, 1 Mich. 34; Duckworth v. Duckworth's Adm'r, 35 Ala. 70; Thompson's Appeal, 126 Pa. St. 367, 17 Atl. 643. An averment is sufficient which necessarily covers with its language full information of the claim sought to be enforced. Evans v. Railroad Co., 68 Mich. 602, 36 N. W. 687. See, also, Middleton v. Booming Co., 27 Mich. 533. See, also, post, p. 205, "Certainty." Where an act alleged in the bill to have been done does not of itself import a fraud, a fraudulent intent must be charged; but no such averment is requisite where, from the statement of facts, fraud is plainly to be inferred. Hale v. Chandler, 3 Mich. 531. See, also, Farnam v. Brooks, 9 Pick. (Mass.) 212. An allegation of an essential fact in a bill in equity, by way of recital, but in such form that the existence of the fact appears by necessary implication, is good as against a general demurrer. Investor Pub. Co. of Massachusetts v. Dobinson, 72 Fed. 603.

ness is further shown by the fact that the complainant can neither offer nor insist upon proof as to any material fact not stated,[4] nor can he recover upon a case different from what his statement shows,[5]

[4] Story, Eq. Pl. § 28; Wilkes v. Rogers, 6 Johns. (N. Y.) 566; Peacock v. Terry, 9 Ga. 148; Sidney v. Sidney, 3 P. Wms. 268, 276; Irnham v. Child, 1 Brown, Ch. 92, 94; Clarke v. Turton, 11 Ves. 240. The material facts on which a complainant relies for relief must be so alleged in his bill as to put them in issue, or the relief cannot be granted, though the facts be proved. Harding v. Handy, 11 Wheat. 103; Jackson v. Ashton, 11 Pet. 229; Knox v. Smith, 4 How. 298; Land v. Cowan, 19 Ala. 297; Skinner v. Bailey, 7 Conn. 496; Bailey v. Ryder, 10 N. Y. 363; U. S. Bank v. Schultz, 3 Ohio, 61; Thomas v. Warner, 15 Vt. 110. Only such facts as are alleged in the bill are in issue. Barrows v. Baughman, 9 Mich. 213. "When a bill charges a defendant with having had notice, or with having committed a fraud, or with insanity or drunkenness, or lewdness or misconduct in office, if the plaintiff intends to prove specific acts of notice, or of fraud, insanity, drunkenness, lewdness, or misconduct in office, it seems that such acts should be specifically charged in the bill; but this view is not fully supported by authority." Langd. Eq. Pl. § 60, citing Weston v. Assurance Corp., L. R. 6 Eq. 23, in support of proposition, and Clark v. Periam, 2 Atk. 337, contra. See, also, Barrows v. Baughman, 9 Mich. 213. As to necessity of pleading evidence likely to surprise defendant, see Langd. Eq. Pl. § 60; Shepherd v. Morris, 4 Beav. 252; Hall v. Maltby, 6 Price, 240, 258, 259; Earle v. Pickin, 1 Russ. & M. 547; Austin v. Chambers, 6 Clark & F. 1, 38, 39; Attwood v. Small, Id. 232, 350. The rule stated by Langdell would probably not be followed in this country. See Story, Eq. Pl. (10th Ed.) § 265a, and notes; Smith v. Burnham, 2 Sumn. 622, Fed. Cas. No. 13,018. Langdell (Eq. Pl. § 59) lays down the rule, as an exception to the general rule that the bill need only state facts as distinguished from evidence, that the substance of admissions proposed to be proved must be alleged, and, if verbal, to whom they were made and when. But this exception does not prevail in this country. Bishop v. Bishop, 13 Ala. 475, 487; Brandon v. Cabiness, 10 Ala. 155; Smith v. Burnham, 2 Sumn. 612, Fed. Cas. No. 13,018; Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 343.

[5] See post, p. 220, "Prayer." "As the defendant is entitled to know what facts the plaintiff intends to prove, in order that he may not be taken by surprise, so he is entitled to know, for the same reason, what use plaintiff intends to make of his facts." Langd. Eq. Pl. § 61. For the same reason plaintiff must indicate the legal grounds upon which he seeks relief. Langd. Eq. Pl. § 62. He cannot shift his ground at the hearing. Id. § 63. "Thus where the bill sets up a case of actual fraud, and makes that the ground of a prayer for relief, the plaintiff cannot obtain a decree by establishing some one or more of the facts quite independent of fraud, but which might of themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated;" citing Price v. Berrington, 3 Macn.

while, if the defendant offers a plea, its validity will be determined with reference to this part of the bill, without regard to the

& G. 486, 498, 499; 1 Daniell, Ch. Pl. & Prac. (5th Ed.) 279. "Nor is he entitled, if he fails in establishing the fraud, to pick out, from the allegations in the bill, facts which might, if not put forward as proofs of fraud, have warranted the plaintiff in asking, and the court in giving, relief on some other ground." Langd. Eq. Pl. § 63; Hickson v. Lombard, L. R. 1 H. L. 324; Palk v. Lord Clinton, 12 Ves. 48; Stevens v. Guppy, 3 Russ. 171, 185; Eyre v. Potter, 15 How. 42; Hoyt v. Hoyt, 27 N. J. Eq. 399. See Williams v. U. S., 138 U. S. 514, 11 Sup. Ct. 457. A bill should show the theory on which complainant intends to rely. Wilson v. Eggleston, 27 Mich. 257. Estoppels, where they form the foundation of the relief asked, and are relied on to defeat a legal title, cannot be proved unless alleged in the bill. Cicotte v. Gagnier, 2 Mich. 381; Moran v. Palmer, 13 Mich. 367. "Although the plaintiff may make out by proof a case which entitles him to relief, yet he can have no decree unless the allegations of the bill are adapted to the case proved, for the court pronounces its decree secundum allegata et probata." 3 Enc. Pl. & Prac. p. 357. See, also, Thayer v. Lane, Walk. (Mich.) 200; Barrows v. Baughman, 9 Mich. 213; Booth v. Thompson, 49 Mich. 73, 13 N. W. 363; Elliott v. Insurance Co., 49 Mich. 579, 14 N. W. 554; Fitzpatrick v. Beatty, 6 Ill. 454; Morgan v. Smith, 11 Ill. 194; Rowan v. Bowles, 21 Ill. 17; Walker v. Ray, 111 Ill. 315; Smith v. Smith, 4 Johns. Ch. (N. Y.) 281, 286; Consequa v. Fanning, 3 Johns. Ch. 587; Forsyth v. Clark, 3 Wend. (N. Y.) 637; Kelsey v. Western, 2 N. Y. 500; Bailey v. Ryder, 10 N. Y. 363; Smith v. Axtell, 1 N. J. Eq. 494; Parsons v. Heston, 11 N. J. Eq. 155; Jordan v. Clark, 16 N. J. Eq. 243; Stucky v. Stucky, 30 N. J. Eq. 546; Clements v. Kellogg, 1 Ala. 330; McDonald v. Insurance Co., 56 Ala. 468; Flewellen v. Crane, 58 Ala. 627; Green v. Covillaud, 10 Cal. 317; Skinner v. Bailey, 7 Conn. 496; Drew v. Beard, 107 Mass. 64; McNair v. Biddle, 8 Mo. 257; Smith v. Smith, 1 Ired. Eq. (N. C.) 83; United States Bank v. Schultz, 3 Ohio, 61; Lamb v. Laughlin, 25 W. Va. 300; Langdon v. Goddard, 2 Story, 267, Fed. Cas. No. 8,060; Eyre v. Potter, 15 How. 42, 56; Crocket v. Lee, 7 Wheat. 522; Mackall v. Casilear, 137 U. S. 556, 11 Sup. Ct. 178; South Park Com'rs v. Kerr, 13 Fed. 502; Spies v. Railroad Co., 40 Fed. 34; Henry v. Suttle, 42 Fed. 91; Allen v. Car Co., 139 U. S. 658, 11 Sup. Ct. 682. The parties are confined to the issues made by their pleadings in a court of equity as much as in a court of law. Hoyt v. Hoyt, 27 N. J. Eq. 399; Brantingham v. Brantingham, 12 N. J. Eq. 160; Brainerd v. Arnold, 27 Conn. 617; Bailey v. Ryder, 10 N. Y. 363. "It may be proper, also, to observe that no admissions in an answer can, under any circumstances, lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill." Jackson v. Ashton, 11 Pet. 229, 249. See, also, Lockard v. Lockard, 16 Ala. 423, 430; Lingan v. Henderson, 1 Bland (Md.) 236, 249; Moran v. Palmer, 13 Mich. 367, 372. But see, contra (semble), Shannon v. Erwin, 11 Heisk. (Tenn.) 337; Browning v. Pratt, 2 Dev. Eq. (N. C.) 44, 49; Wilmington Star Min. Co. v.

interrogating part differing from it.[6] The method of statement will be fully considered hereafter, but it may be said here that a general charge or statement of the facts relied on will ordinarily be sufficient, minute and detailed circumstances tending to establish such charge being properly matters of evidence, which will be received at the trial without specific allegation.[7]

"The statement of the complainant's case in the bill differs little in language or form from any other statement of facts which might be drawn up for the information of third parties." [8]

"The best general rule that can be followed by the pleader is that, having first satisfied himself that his facts support an equity, he should draw his bill as if he were making verbally a short, but very

Allen, 95 Ill. 288; Mortimer v. Orchard, 2 Ves. Jr. 243. A bill may be dismissed where it is unsupported by evidence. Tyler v. Tyler, 126 Ill. 525, 21 N. E. 616. So where the proofs do not correspond with the allegation. Rowan v. Bowles, 21 Ill. 17. And this although the facts proved make a case which, properly pleaded, would be a case for relief. Id. See, also, post, p. 319, "Allegata et Probata."

[6] Story, Eq. Pl. §§ 27, 36; Clayton v. Earl of Winchelsea, 3 Younge & C. 683. The interrogating part may be referred to for the purpose of explaining an ambiguity in the stating part. Lingan v. Henderson, 1 Bland (Md.) 236, 249. If the stating part of a bill in equity shows no ground for an account, a prayer for an account does not entitle the plaintiff to maintain his bill. Bushnell v. Avery (1876) 121 Mass. 148.

[7] Story, Eq. Pl. § 28; Wheeler v. Trotter, 3 Swanst. 174, 177; Chicot v. Lequesne, 2 Ves. Sr. 315, 317; Dunham v. Railroad Co., 1 Bond, 492, Fed. Cas. No. 4,150; Winebrenner v. Colder, 43 Pa. St. 244; Bishop v. Bishop, 13 Ala. 475; Lovell v. Farrington, 50 Me. 239. See cases cited supra, note 1. Evidence is not to be set out in a bill. Hubbard v. McNaughton, 43 Mich. 220, 5 N. W. 293. It is only necessary to state the facts in a bill in chancery, unless law and fact be so blended as to render it necessary to state both. Kelly's Heirs v. McGuire, 15 Ark. 555. A bill should contain allegations of facts, not mere recitals of circumstantial evidence. Wilson v. Eggleston, 27 Mich. 257. The circumstances which tend to establish fraud need not be detailed in the bill. It is sufficient if the facts which constitute the fraud are set forth with an averment of the injurious result; and a detail of the circumstances which tend to establish a dishonest intent in defendant's action is more properly left to the evidence. Tong v. Marvin, 15 Mich. 60; Hubbard v. McNaughton, 43 Mich. 220, 5 N. W. 293; Merrill v. Allen, 38 Mich. 487; Reeg v. Burnam, 55 Mich. 39, 20 N. W. 708, and 21 N. W. 431. See post, p. 328.

[8] 1 Fost. Fed. Prac. (2d Ed.) § 67.

accurate, statement of them to a very precise and particular person." [9]

Arguments in support of the equities relied upon should not be inserted either in a bill or an answer. "The place for all this is upon the argument of the cause, and not in the pleadings; and the practice, besides incurring unnecessary costs, is productive of very great inconvenience; for, when it becomes necessary to look over the pleadings for a particular point, it is literally 'hunting for a needle in a haystack.'" [10]

Stating Evidence.

The twofold character of the bill, as a pleading and as an examination of the defendant, has been before adverted to.[11] The form of the stating part is sometimes affected by this fact. In so far as the bill subserves the purpose of a pleading, all that was ever necessary to be stated was the facts upon which the complainant based his right to relief, as distinguished from the evidence by which such facts were to be established.[12]

But so far as the bill performs the office of an examination of the defendant, and seeks a discovery, the bill must be made specific in proportion as a specific answer is desired, for the defendant is only required to answer categorically what is stated in the bill.[13] Hence comes the rule that "you must state evidence for the purpose of obtaining discovery, but for all other purposes you need only state facts." [14] Evidence is therefore sometimes stated somewhat in detail in the stating part, and, as the defendant must answer the whole bill, the desired discovery is obtained. But the more usual and better form is to limit the stating part of the bill to a statement of the facts constituting the cause of suit, and then to state or charge evidence of those facts in the charging part.[15] The further consideration of this subject is therefore postponed until the charging part of the bill is under discussion.[16]

[9] Heard, Eq. Pl. p. 20.

[10] Welsman v. Mining Co., 4 Jones, Eq. (N. C.) 112.

[11] See ante, p. 170.

[12] Story, Eq. Pl. §§ 28, 252; Mewshaw v. Mewshaw, 2 Md. Ch. 12, 14; Chicot v. Lequesne, 2 Ves. Sr. 315, 318; Clark v. Periam, 2 Atk. 337. See ante, note 7.

[13] See post, p. 505.

[14] Langd. Eq. Pl. § 57.

[15] Id.

[16] See post, p. 205.

117. SAME—WHAT MUST BE STATED—The statement of an equitable cause of action involves a statement of facts showing:

(a) A present, existing title or interest, in the complainant, in and to the subject-matter of the controversy, and a present right to sue regarding the same.

(b) An interest, in the defendant, in the subject-matter in question, and a liability to the complainant in regard thereto.

(c) More fully: The relation of the parties to the subject-matter and to each other; the right of the complainant flowing therefrom; and an injury or grievance, actual or threatened, arising either from the breach or omission, by the defendant, of some duty imposed upon him, or from the peculiar situation of the parties, and of which a court of equity can take cognizance.

Complainant's Title or Interest.

It has been well stated by a recent author that "the essentials of a bill in equity are two: It should contain enough; it must not contain too much;" [1] and the statement is particularly true in regard to the presentment of facts in the stating part of the bill, since this part properly contains the statement of the complainant's equitable cause of action, and determines the sufficiency of the bill as a pleading. In considering the latter, the first indispensable requisite in the logical analysis of the complainant's cause of action is his title to or interest in the subject-matter of the suit, or his right to the thing demanded.[2]

§ 117. [1] Merwin, Eq. Pl. § 917.

[2] Smith v. Austin, 9 Mich. 465; Lamb v. Jeffrey, 47 Mich. 28, 10 N. W. 65; Manning v. Fifth Parish, 6 Pick. 617; Phillips v. Schooley, 27 N. J. Eq. 410; Cruger v. Halliday, 11 Paige (N. Y.) 314; Barr v. Clayton, 29 W. Va. 256, 11 S. E. 899; Rapier v. Paper Co., 64 Ala. 330; Mercantile Trust Co. v. Kanawha & O. Ry. Co., 39 Fed. 339; Edney v. King, 4 Ired. Eq. (N. C.) 465; Barry v. McAvoy, 10 Phila. 99. A bill filed by a settler on swamp lands to enforce a right under a statute must show a substantial compliance with every provision of the act on which the right depends. Remeau v. Mills, 24 Mich. 15. A

If such right or interest is not shown by the bill, it is demurrable;[3] and the rule as stated is one not only prescribed by the highest authorities,[4] but is plainly one of necessity, since a mere volunteer cannot maintain a bill in equity.

Unless complainant has a title to or interest in the subject-matter of the suit, a court of equity has no ground for interference, and the very basis of an action is wanting. Thus, where a complainant claims under a will, and it appears, from a construction of the in-

complainant must aver in his bill all that is necessary to show his right and title to the relief he seeks. Davenport v. Alston, 14 Ga. 271. A bill should contain a statement of the title of the plaintiff and defendant, so that the pleadings may show the titles claimed by the parties without looking to the evidence. Humphreys v. Tate, 4 Ired. Eq. (N. C.) 220. It is not essential that the complainant's title should be explicitly averred. It is sufficient if it may be fairly inferred from the facts stated. Webber v. Gage, 39 N. H. 182. In chancery, whoever claims the right of another must show that he from whom he claims had good right, and that he has good authority to claim his right. Cook v. Beacher, 1 Root (Conn.) 483. A bill for relief for an injury to the property of the plaintiff must show not only that he was owner of the property at the time of the injury, but also that he is owner at the time of filing the bill. Wiggin v. Mayor, 9 Paige (N. Y.) 16. A bill for an account must show by specific allegations that there was a fiduciary relation between the parties, or that the account is so complicated that it cannot conveniently be taken in an action at law. Badger v. McNamara (1877) 123 Mass. 117; Walker v. Brooks (1878) 125 Mass. 241.

[3] 1 Daniell, Ch. Pl. & Prac. 315. See cases cited in preceding note. See, also, post, p. 395, "Demurrer." "Every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill; otherwise the defect will be fatal. For no facts are properly in issue unless charged in the bill, and, of course, no proofs can be generally offered of facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent from another part of the pleadings and evidence, for the court pronounces its decree secundum allegata et probata." Story, Eq. Pl. § 257. See Carter v. Carter, 82 Va. 624; Emerson v. Walker Tp., 63 Mich. 483, 30 N. W. 92. A decree founded on a bill which shows no right of action in the complainant against the defendant in respect to the subject-matter of the suit, like a judgment which is entirely outside of the cause of action specified in the pleadings in the suit in which it is pronounced, is a nullity, and will be so treated even in a collateral proceeding. Consolidated Electric Storage Co. v. Atlantic Trust Co., 50 N. J. Eq. 93, 24 Atl. 229.

[4] Mitf. Eq. Pl. (Jeremy's Ed.) 155, 156; 1 Daniell, Ch. Pl. & Prac. 315; Story, Eq. Pl. §§ 503–508.

strument, that he has no title, a demurrer will be allowed.[5] So, in a bill for the protection of an easement, it is necessary to allege a title to the right claimed either as an incident to land, or by grant or prescription.[6] So, in a bill to remove a cloud from title, complainant's title to the land must appear.[7] And generally, whenever relief is sought, it must appear from the face of the bill that complainant has a right to or interest in obtaining the relief asked for, which a court of equity can recognize and enforce.

Where a bill is brought by several complainants jointly, it must appear that all of them have an interest in the subject-matter of the suit. If it appears that any one of them has no interest, there is a misjoinder, and formerly the bill was demurrable.[8]

Same—Interest without Right to Sue.

Plaintiff may have an interest in the subject-matter, and yet not be entitled to institute a suit concerning it, either by reason of his peculiar relation to the subject-matter in controversy and to others interested therein, or because no duty is owing him from defendant in respect thereto. Hence the rule is often stated that a complainant must not only show in his bill an interest in the subject-matter, but it must also appear that he has a present right to maintain a suit concerning it.[9] Thus a person may have an interest in the subject-matter, and yet, for want of compliance with some requisite forms, he may not be entitled to institute a suit concerning it.[10] Such an instance of the existence of an interest without the right to sue is shown in the case of an executor who has not proved the will under which his authority is derived, and who therefore cannot sue, although he has an interest in all the personal property of the testator.[11] So where it

[5] Brownsword v. Edwards, 2 Ves. Sr. 243; Mortimer v. Hartley, 3 De Gex & S. 316. If the objection is not taken until the hearing, the bill may be dismissed, without costs. Daniell, Ch. Pl. & Prac. 315.

[6] Winnipiseogee Lake Co. v. Young, 40 N. H. 420.

[7] See post, p. 250.

[8] Daniell, Ch. Pl. & Prac. 316; Story, Eq. Pl. § 509; Clarkson v. De Peyster, 3 Paige (N. Y.) 336, 337; Manning v. Inhabitants of Fifth Parish in Gloucester, 6 Pick. (Mass.) 6.

[9] Daniell, Ch. Pl. & Prac. 317; Story, Eq. Pl. § 260; Mitf. Eq. Pl. (by Jeremy) 155, 156. See Richards v. Butcher, 62 Law T. (N. S.) 867.

[10] Daniell, Ch. Pl. & Prac. 318.

[11] Daniell, Ch. Pl. & Prac. 318, note 1; Story, Eq. Pl. § 625; Humphreys v.

appears that, in order to complete the complainant's title to the subject of the suit or to the relief he seeks, some preliminary act is necessary to be done, as the performance of conditions precedent, or the giving of notice, the performance of such preliminary acts, or a valid excuse for nonperformance, must be alleged.[12] Again, as will be hereafter seen, the facts as stated must generally show a privity between complainant and defendant, or there will be a case of interest without a right to sue.[13] Thus an unpaid legatee cannot sue persons indebted to the estate to enforce payment of their debts, and the beneficiaries under a trust cannot proceed against an agent of the trustee for an accounting. The debtor of the estate owes his debt to the executor or administrator, not to the legatee. The legatee's remedy is against the executor or administrator. So the agent's duty to account is due to the trustee, his principal, and not to the beneficiaries. The trustee is liable to them for his own and his agent's acts.[14]

Same—Nature of Interest Required.

The interest which complainant is required to show must be a present existing interest; a mere possibility, or even probability, of a future title will not support the bill.[15] Thus a purchaser from a contingent remainder-man of the latter's interest in the property cannot maintain a bill against a tenant for life for inspection of title deeds, although such a bill by a person entitled to a vested remainder would lie.[16] There are cases, however, in which contingent

Ingledon, 1 P. Wms. 752. A bill by an executor must allege probate of the will. Carter v. Ingraham, 43 Ala. 78, 84; Armstrong v. Lear, 12 Wheat. 169; Pelletreau v. Rathbone, 1 N. J. Eq. 331. An allegation of such fact in the answer will cure its omission from the bill. Richardson v. Green, 9 C. C. A. 565, 61 Fed. 423.

[12] Where the complainant's right depends upon the performance of conditions precedent, his bill should aver such performance. Goodenow v. Curtis, 18 Mich. 298. "The mere allegation that the title is complete without such averment will not be sufficient." 1 Daniell, Ch. Pl. & Prac. 319. See Walburn v. Ingilby, 1 Mylne & K. 61, 77.

[13] Post, p. 202.

[14] Post, p. 203.

[15] Daniell, Ch. Pl. & Prac. 316; Finden v. Stephens, 2 Phil. Ch. 142, 148; Showell v. Winkup, 60 Law T. (N. S.) 389; Davis v. Angel, 31 Beav. 223; Sackville v. Ayleworth, 1 Vern. 105.

[16] Noel v. Ward, 1 Madd. 322, 329; Davis v. Earl of Dysart, 20 Beav. 405.

remainder-men can be complainants.[17] Where, however, complainant's interest is a present vested interest, it is sufficient to maintain the bill, no matter how minute it may be.[18] So, provided the interest is a present one, it is wholly immaterial that the possession and enjoyment is postponed to a distant time, or made to depend on a remote and improbable contingency.[19] If, however, such interest may be barred or defeated by the act of defendant, the bill cannot be maintained, for the defendant might at any time nullify the whole proceeding.[20]

Relief must be based on the title alleged, and not upon another and different title.[21] "It will be perceived from what has been stated * * * that the question what title the complainant must show resolves itself, in effect, into this: What are the equitable rights that attach to his person and status? And the principle is

[17] Daniell, Ch. Pl. & Prac. 317. Suits for the administration of or to secure the trust property to which they are entitled are illustrations. See Roberts v. Roberts, 2 De Gex & S. 29, 2 Phil. Ch. 534; Bartlett v. Bartlett, 4 Hare, 631.

[18] Allan v. Allan, 15 Ves. 130, 136. See Seaton v. Grant, 2 Ch. App. 459.

[19] Allan v. Allan, 15 Ves. 130, 136; Daniell, Ch. Pl. & Prac. 317. "A mere expectancy, however strong, is not sufficient; but the party must have a positive interest." Story, Eq. Pl. § 301; citing Dursley v. Berkeley, 6 Ves. 260.

[20] Daniell, Ch. Pl. & Prac. 316; Dursley v. Berkeley, 6 Ves. 260. "It would be a fruitless exercise of power." Story, Eq. Pl. § 301. But see Butcher v. Jackson, 14 Sim. 444.

[21] Moran v. Palmer, 13 Mich. 367; McKinley v. Irvine, 13 Ala. 681, 698; Crabb's Adm'r v. Thomas, 25 Ala. 212; Meadors v. Askew, 56 Ala. 584; Whitney v. City of New Haven, 58 Conn. 450, 20 Atl. 666; Langdon v. Goddard, 2 Story, 267, Fed. Cas. No. 8,060. In a case where the complainants by their bill asserted their title under the will of a testator, and claimed relief accordingly, and likewise stated every fact necessary to enable them to recover as his personal representatives, it was held that under the prayer for general relief they were entitled to recover as the personal representatives of the testator, though they might not be so entitled according to the specific prayer or the precise character in which they present their claims. Wootten v. Burch, 2 Md. Ch. 190. Their title as personal representatives is a conclusion of law founded upon the statements of the bill; and it is well settled that, where facts are stated upon which legal conclusions arise, these legal conclusions need not themselves be stated. Id. When a plaintiff asks relief as a purchaser, but the facts on which his right to relief depends, as stated in the bill, show that he is entitled to the relief sought as mortgagee, the bill is not demurrable on account of the mistake in the conclusion drawn from the facts. Rapier v. Paper Co., 64 Ala. 330.

that he must in all cases allege enough of his individuality and status to show that he is entitled to the equitable right injured, or to some part of it." [22]

Same—Manner of Alleging Title.

Complainant's title to, or interest in, the subject-matter of the suit, or the relief sought, is a conclusion of law. It is therefore not sufficient to simply allege that complainant has such a title or interest, but the facts from which such title or interest results must be alleged.[23] Thus a person who claims title by descent must, in general, show the

[22] Heard, Eq. Pl. p. 26. A party claiming the benefit of a statute makes out no case for relief, unless by his pleadings he brings himself within its beneficial provision. Eberhart v. Gilchrist, 11 N. J. Eq. 167.

[23] "As to the form of pleading title in a bill, the general rule is this: The plaintiff must allege the facts from which the court, assuming them to be true, can collect that he has title. He must allege facts, not mere inferences of law. For instance, it would not be good and sufficient pleading in a bill by a tenant in remainder under a deed, against the tenant for life (say for restraining waste), to allege simply that the plaintiff is tenant in remainder, for whether he is so or not is an inference of law to be drawn from the limitations of the instrument under which he claims. But he should allege that A. made and executed a certain deed, whereby he conveyed to the defendant for his life, and from and after, etc., to the plaintiff and his heirs (or to the plaintiff for his life, etc., as the case may be), setting out the material parts of the limitations. So, in a suit by a cestui que trust against his trustees in respect of any breach of trust, it is not sufficient to allege that the plaintiff is entitled to an equitable interest under the instrument vesting the legal estate in the trustees; but a properly drawn bill will set out or state so much of the instrument creating the trust estates as shows that the plaintiff takes under it an equitable interest." Heard, Eq. Pl. p. 26, citing Drew. Eq. Pl. 10. A party coming into chancery, and claiming a right as a substituted trustee under a will, should state in his bill the necessary facts to show that a vacancy had occurred which authorized his appointment as such substituted trustee. Cruger v. Halliday, 11 Paige (N. Y.) 314. A bill alleging that complainant has a superior title both in law and equity, but not describing the nature of the claim, or referring to any document of title, should be dismissed. Clark v. Bell, 2 B. Mon. (Ky.) 1. An allegation in a bill that the complainant is the bona fide holder and transferee of a note, and that the same is unpaid, is, in connection with a copy of the note exhibited, a sufficient allegation of title. Owen v. Moore, 14 Ala. 640. In a bill in equity, under Rev. St. Mass. c. 81, § 8, to obtain possession of a horse, secreted from the plaintiff, so that it cannot be replevied, an allegation that the plaintiff was the owner of the horse, and had the right of possession, is sufficient, without setting forth the particulars of his title, especially when the plaintiff waives

facts of such title, though this requirement may not in all cases extend to a necessity for the mention of every link in the complainant's pedigree.[24] So an assignee must show the assignment under which he claims, and an executor or administrator the facts establishing his representative character.[25]

In short, the facts or instruments creating complainant's title must be alleged. The existence of that title is a legal conclusion, and though it is usual, for the purpose of making his position perfectly clear, for the complainant to specifically allege what interest the facts entitle him to, as that, by reason of a certain deed or will alleged in the bill, complainant is entitled to an estate for life or in fee, such allegation is perhaps never necessary, and without an allegation of the facts upon which it is based it is wholly nugatory.[26]

Statement of Injury.

The complainant, having alleged facts showing his title to the right or duty sought to be protected or enforced, must next allege facts showing an actual or threatened infringement of such right or breach of duty.[27] The facts alleged must make a case for relief falling within the equitable jurisdiction of the court.[28] What facts are

answer under oath. Strickland v. Fitzgerald, 7 Cush. (Mass.) 530. As to the sufficiency of an averment of an equitable title, in a bill brought to obtain the legal title to land, see Botsford v. Beers, 11 Conn. 369.

[24] Post, p. 325, "Title or Interest." See, also, Bliss, Code Pl. § 228; Morton v. Waring's Heirs, 18 B. Mon. (Ky.) 72, 82. "It is now settled that an allegation that he is heir is sufficient." 1 Daniell, Ch. Pl. & Prac. 320.

[25] Bliss, Code Pl. §§ 228, 229. A general allegation of ownership of personal property is sufficient. Malcom v. O'Reilly, 89 N. Y. 157. An allegation that plaintiff is seised in fee simple is sufficient. Where a derivative title is alleged, facts must be stated showing how plaintiff became entitled. See 1 Daniell, Ch. Pl. & Prac. 320.

[26] Heard, Eq. Pl. p. 27. See, also, ante, p. 198, note 23.

[27] Lube, Eq. Pl. §§ 233–235; Story, Eq. Pl. § 27.

[28] The bill must allege facts constituting a case within the jurisdiction of the court, and entitling plaintiff to relief. Highstone v. Franks, 93 Mich. 52, 52 N. W. 1015; Kip v. Kip, 33 N. J. Eq. 213; Lockard v. Lockard, 16 Ala. 425, 430. The bill must state a cause within the proper jurisdiction of a court of equity. If it fails in this respect, the error is fatal in every stage of the case, and can never be cured by any waiver or course of proceedings by the parties. Chase v. Palmer, 25 Me. 341. See, also, Richards v. Railway Co., 124 Ill. 516, 16 N. E. 909. In Michigan the bill must show that the amount involved is more than $100, in order to give equity jurisdiction. Palmer v. Rich, 12 Mich.

sufficient to constitute an equitable cause of action is not a question of equity pleading, but of equity jurisdiction, and as such is beyond the scope of this book. This statement of grievance corresponds to the breach in the declaration at common law, and should be made with brevity and succinctness.[29] "When the injury sought to be redressed is occasioned by the subtraction of a duty on the part of the defendant, this part of the bill merely contains a statement of request and refusal, viz.: That various applications were made to the defendant, requesting him to do justice to the complainant and restore to him the right demanded, or perform the duty withheld, which nevertheless he has refused to do. The refusal is most commonly ushered in by the formal charge of confederacy, which, though usually inserted, is altogether unnecessary,[30] as new parties may be added at any period of the suit, without any such charge in the bill; and therefore, in amicable suits, the refusal is stated without charging combination, and this form is invariably omitted where the defendant is a peer of the realm.[31] In those cases, on the other hand, where the grievance arises out of the peculiar situation of the parties, the complainant, having explained by his statement their relative position, goes on in this part of his bill briefly to show the nature of the difficulty resulting from it, or the hardship likely to ensue, unless a court of equity interposes to his relief, 'to the end, therefore,' etc. Here, then, the student will observe, as no refusal is stated, of course the introductory charge of confederacy has no place; and, in like manner, as the necessity for the interference of a court of equity is embodied in the very statement of grievance, the formal clause of equity, as it is called, commencing, 'and for as much as your orator is without remedy in the premises,' is also omitted. In the statement of the injury for which redress is sought it is obvious that the draftsman must be previously acquainted with the extent of the jurisdiction of the court, and to this point the student should turn his particular attention, in order that he may be able

414; Lucking v. Wesson, 25 Mich. 443; Raymond v. Shawboose, 34 Mich. 142; Wilmarth v. Woodcock, 58 Mich. 482, 25 N. W. 475; Abbott v. Gregory, 39 Mich. 68; Glidden v. Norvell, 44 Mich. 202, 6 N. W. 195.

[29] See post, p. 322, "Certainty."

[30] See post, p. 204; Oliver v. Haywood, 1 Anstr. 82.

[31] Mitf. Eq. Pl. 33.

to set forth such a grievance in his bill as a court of equity will take cognizance of; for the mere averment that there is no remedy but in equity will not avail, unless it appear also on the face of the statement that the case is such that the court of chancery can compel a discovery or decree relief." [32]

Defendant's Interest and Liability.

Facts must be stated in the bill showing that defendant is in some way liable to complainant's demands, or at least is interested in the subject-matter of the suit.[33] Indeed, the whole question as to who are proper and necessary parties to a bill has been seen to depend on the question of interest.[34] If, therefore, the bill fails to show any interest in the defendant, it is demurrable.[35] The same rule applies where several persons are joined as defendants, and each must appear to have an interest in the subject-matter of the suit, or to be liable to complainant.[36] This rule is subject to the exception already noted, that in the case of bills against a corporation its officers and agents may be made parties for the sake of a discovery.[37]

[32] Lube, Eq. Pl. §§ 234, 235.

[33] Story, Eq. Pl. § 262; Humphreys v. Tate, 4 Ired. Eq. (N. C.) 220; Crane v. Deming, 7 Conn. 387; Sprague v. Shields, 61 Ala. 428; Bogan v. Camp, 30 Ala. 276; Jerome v. Jerome, 5 Conn. 352; Plumbe v. Plume, 4 Younge & C. Exch. 345; Ponsford v. Hankey, 3 De Gex, F. & J. 544. Defendants must be clearly designated as such. See Anderson v. Wilson, 100 Ind. 402; Kanawha Valley Bank v. Wilson, 35 W. Va. 36, 13 S. E. 58; Elmendorf v. Delancey, Hopk. Ch. (N. Y.) 555. Naming a person in the summons and serving him with process is not sufficient to make him a party. Chapman v. Railroad Co., 18 W. Va. 184, 196. "A prayer, not that process issue, but that certain persons be treated as defendants and required to answer the bill, would certainly make them defendants." Cook v. Dorsey, 38 W. Va. 196, 198, 18 S. E. 468. Some cases hold that no persons are parties against whom process is not prayed. See post, p. 233, "Prayer for Process." In the federal courts, the equity rules require a description of the respondents in the introductory part. See ante, p. 185.

[34] See ante, c. 2, "Parties."

[35] Emerson v. Walker Tp., 63 Mich. 483, 30 N. W. 92; Crosseing v. Honor, 1 Vern. 180; Lord Uxbridge v. Staveland, 1 Ves. Sr. 56; Daniell, Ch. Pl. & Prac. 321.

[36] Alworth v. Seymour, 42 Minn. 526, 44 N. W. 1030. See, also, Moore v. Fitz Randolph, 6 Leigh (Va.) 175; Sterling v. Klepsattle, 24 Ind. 94.

[37] Daniell, Ch. Pl. & Prac. 322. A bill against a corporation for relief, and a member thereof for discovery, need not allege that he had any special in-

The title or interest of the defendant does not require the same particularity of statement as that of the complainant, and it is generally sufficient if enough appear to show that he has an interest, the facts not being supposed to be within the complainant's knowledge.[88]

118. SAME—PRIVITY—Where privity is essential to defendant's liability to complainant, its existence must be shown by the bill.

"A bill must not only show that the defendant is liable to the plaintiff's demands, or has some interest in the subject-matter, but it must also show that there is such a privity between him and the plaintiff as gives the plaintiff a right to sue him; for it is frequently the case that a plaintiff has an interest in the subject-matter of the suit which may be in the hands of a defendant, and yet, for want of a proper privity between them, the plaintiff may not be the person entitled to call upon the defendant to answer his demand. Thus, although a principal is entitled to an account against his agent, the persons for whom the principal is a trustee are not so entitled, and, where a suit was instituted by them against the trustee and his agent for an account, a demurrer by the agent was allowed." [1]

"With reference to the subject of privity between the plaintiff and defendant, it is to be observed that the employment of agents or brokers in a transaction does not interfere with the privity between the principals, so as to deprive them of their right to sue each other immediately." [2]

formation, nor assign any special reason for requiring such discovery. Wright v. Dame, 1 Metc. (Mass.) 237.

[88] Daniell, Ch. Pl. & Prac. 321; Story, Eq. Pl. § 255; Morgan v. Smith, 11 Ill. 194; Baring v. Nash, 1 Ves. & B. 551; Roberts v. Clayton, 3 Anstr. 715. See post, p. 322, "Certainty."

§ 118. [1] Daniell, Ch. Pl. & Prac. 322; citing, inter alia, Elmslie v. McAulay, 3 Brown, Ch. 624; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305; Dumont v. Fry, 12 Fed. 21; McClaskey v. O'Brien, 16 W. Va. 791; Attorney General v. Earl of Chesterfield, 18 Beav. 596; Maw v. Pearson, 28 Beav. 196; Bickley v. Dorrington, West, Ch. 169; Walker v. Walker, 20 Wkly. Rep. 162. "The privity necessary to exist between parties to proceedings in equity is not necessarily a privity of contract, but such as gives the complainant a title to sue the defendant." Busby v. Littlefield, 31 N. H. 193, 198.

[2] Daniell, Ch. Pl. & Prac. 325.

"Where there is a privity existing between the plaintiff and defendant, independently of the plaintiff's title, which gives the plaintiff a right to maintain his suit, it is not necessary to state the plaintiff's title fully in the bill. * * * Where a man employs another as his bailiff or agent, to receive his rents, the right to call upon the bailiff or agent for an account does not depend upon the title of the employer to the rents or tithes, but to the privity existing between him and his bailiff or agent. The employer may therefor maintain a bill for an account, without showing any title to the rents or tithes in question. Where, however, the plaintiff's right does not depend upon any particular privity between him and the defendant, existing independently of his general title to the thing claimed, there it will be necessary to show his title in the bill." [3] "Although an unsatisfied legatee has an interest in the estate of his testator, and has a right to have it applied to answer his demands in a new course of administration, yet he has no right to institute a suit against the debtors to his testator's estate for the purpose of compelling them to pay their debts in satisfaction of his legacy; for there is no privity between the legatee and the debtors, who are answerable only to the personal representatives of the testator, unless by collusion between the representative and the debtors, or other collateral circumstances, a distinct ground is given for a bill by the legatee against the debtor." [4] Yet, "in cases of collusion between the debtor and executor, or of the insolvency of the executor, bills by creditors or residuary legatees against debtors to a testator's estate will be entertained; * * * and in a suit by universal legatees under a will, for an account against a debtor to the testator's estate, * * * an account was, under the circumstances, directed, although collusion was not established between the debtor and the personal representative, and there was not any

[3] Daniell, Ch. Pl. & Prac. 320, 321; citing, inter alia, Humphreys v. Tate, 4 Ired. Eq. (N. C.) 220; Peck v. Malloms, 10 N. Y. 509; State v. Black River Phosphate Co., 27 Fla. 276, 9 South. 205.

[4] Story, Eq. Pl. § 262. "For the same reason, where a debtor is entitled to a part of the residue of the estate, either as legatee or as distributee, his creditor cannot maintain a bill against the personal representative of deceased, making the debtor and the other residuary legatees or distributees parties, for the purpose of having the assets applied towards the payment of his demand." Story, Eq. Pl. § 262.

evidence of insolvency on the part of the personal representative, or of his refusal to sue for the debt, other than his omission to institute proceedings for a considerable period." [5]

119. THE CONFEDERATING PART—The fourth formal part of the bill is called the "confederating part." It consists of a charge that the defendants and divers other persons unknown, but whose names when discovered it is prayed may be inserted in the bill, have combined and confederated together to defraud complainant of his rights.

120. This part of the bill is wholly unnecessary, and under the United States equity rules complainant may use it or not, at his option.

"The fourth part is what is commonly called the 'confederating part' of the bill. It contains a general allegation or general charge of a confederacy between the defendants and other persons to injure or defraud the plaintiff. The usual form of the charge is that "the defendants, combining and confederating together, and with divers other persons as yet to the plaintiff unknown, but whose names, when discovered, he prays may be inserted in the bill, and they be made parties defendants thereto, with proper and apt words to charge them with the premises, in order to injure and oppress the plaintiff in the premises, do absolutely refuse," etc., or pretend, etc. The practice of inserting this charge is said to have arisen from an idea that, without it, parties could not be added to the bill by amendment; and in some cases, perhaps, it was inserted with a view to sustain the jurisdiction of the court.[1] But, in either view, it is wholly unnecessary.[2] In the first place, it never was true at any time that new parties might not have been added by amendment after the filing of the bill.[3] In the next place, the mere allegation

[5] Daniell, Ch. Pl. & Prac. 323. For exceptions to this rule, see Id. 324.

§§ 119–120. [1] Bart. Suit in Eq. 44; Story, Eq. Pl. § 29.

[2] Story, Eq. Pl. § 29; Comstock v. Herron, 45 Fed. 660; Stone v. Anderson, 26 N. H. 506. "It is scarcely necessary to say that such a charge would now, except under very special circumstances, be deemed idle and impertinent." Daniell, Ch. Pl. & Prac. 372.

[3] Coop. Eq. Pl. 10, 11; Bart. Suit in Eq. 44; Story, Eq. Pl. § 29.

of combination or confederacy of the defendants, simply as such, could never alone have been a just foundation for the jurisdiction of a court of equity in the absence of all other proper matter to sustain it. Confederacy or combination, as a gravamen, seems clearly cognizable at law.[4] Indeed, although it is now usually, but not invariably, inserted in bills, yet it is treated as mere surplusage; so much so that it is said that the general charge of combination need not be (although it usually is) denied or responded to in the answer, when charged in the bill, for it is mere impertinence.[5] If combination or confederacy is meant to be relied on, as a ground of equitable jurisdiction, it can be only in special cases; and then it must be specially and not generally charged, to justify an assumption of jurisdiction."[6]

121. THE CHARGING PART—The fifth formal part of a bill is called the "charging part." It consists of an allegation of the pretenses which it is supposed that the defendant will set up for his excuse or justification, followed by a charge of other matters to disprove or avoid them.

122. The charging part performs a double function:

(a) It is used somewhat like a cross-examination to extract a discovery (p. 206).

(b) It is used to anticipate a defense, and thus supersedes the use of a special replication (p. 206).

123. Under the United States equity rules, it is optional with the complainant to include this portion of the bill in the stating part, or to dispense with it entirely.

[4] Bart. Suit in Eq. 44.

[5] Story, Eq. Pl. § 29; Daniell, Ch. Pl. & Prac. 372; Oliver v. Haywood, 1 Anstr. 82; Adams v. Porter, 1 Cush. (Mass.) 170. In many jurisdictions, by rule of court or statute, the use of this part is made optional or forbidden. See United States Equity Rules, Rule 21; Ch. Rule 3 (38 N. H. 605); Stone v. Anderson, 26 N. H. 506; Ch. Rule 1 (37 Me. 581); Code Ala. 1886, § 3422; Mill. & V. Code Tenn. 1884, § 5057; Ch. Rule Mass. Rule 4 (14 Gray, 351); Adams v. Porter, 1 Cush. (Mass.) 170.

[6] Story, Eq. Pl. §§ 29, 30; Lewis v. Lewis, 9 Mo. 183. But see Farnam v. Brooks, 9 Pick. (Mass.) 212, 219; Stone v. Anderson, 26 N. H. 506.

Extracting a Discovery.

We have before noted that the bill performs the double function of a pleading and an examination of the defendant. The four formal parts already considered belong to the bill as a pleading, in common with the declaration at law. The fifth formal part has peculiar reference to the character of the bill as an examination. One of the principal advantages attendant upon the mode of proceeding in chancery is that the complainant is entitled to have an answer upon oath from the defendant as to all the facts stated in the bill.[1] So far, then, as the defendant expressly admits the facts alleged in the bill, it precludes the necessity of having them proved in evidence; and, on the other hand, if there be an unequivocal denial on the part of the defendant, two witnesses, at least, are required to establish the fact against his oath.[2] One of the chief objects of the pleader's care, therefore, should be to charge in his bill all such material circumstances of the case as may tend to draw forth from the defendant an admission of the principal matters, and so avoid the necessity of proving them by depositions. The defendant is, indeed, required to answer the stating part, but as this properly consists merely of a concise statement of the ultimate, issuable facts constituting the grievance complained of, an unwilling defendant, by answering according to the letter of the allegation, could easily evade giving the required discovery.[3] Hence comes the practice of "charging" evidence minutely for the sake of discovery.[4]

Anticipating a Defense—Supporting Prayer.

"This, then, is the peculiar province of the charging part of the bill. * * * But this, though the principal, is not the only, end of the charging part, for, as the relief sought frequently consists of

§§ 121–123. [1] See post, p. 212.

[2] See ante, p. 133.

[3] Lube, Eq. Pl. § 240.

[4] Langd. Eq. Pl. § 57; Freichnecht v. Meyer, 39 N. J. Eq. 551. See post, p. 212, "Interrogating Part." The complainant may call for an answer on oath, not only to the main charges in the bill, upon which his claim to relief is founded, but also as to matters of evidence and collateral facts stated in the bill which are material in establishing the main charges, or in ascertaining the nature or kind of relief to which he is entitled. But, if the defendant admits the main fact charged in the bill, it is unnecessary for him to answer as to other matters which are merely stated as evidence of that fact. Mechanics' Bank v. Levy, 3 Paige (N. Y.) 606.

a variety of particulars, the charges are sometimes made to support a part of the prayer. Thus, the circumstances which warrant the application for an injunction are generally stated in the charging part.[5] Again, if it be anticipated that the defendant has any matter of avoidance to set up against the statement of complaint, whatever will operate to rebut that avoidance should be stated by way of charge, founded upon the supposed reasons of the defendant for refusing to accede to the complainant's reasonable requests; and in this respect the charging part supersedes the use of a special replication." [6]

[5] Lube, Eq. Pl. § 237.

[6] Lube, Eq. Pl. § 237. "It was formerly the practice of pleaders in equity to state the plaintiff's case in the bill very concisely, and then, if any matter was introduced into the defendant's plea or answer which made it necessary for the plaintiff to put in issue, on his part, some additional fact in avoidance of such new matter, such new fact was placed upon the record by means of a special replication. In order to avoid the inconvenience, delay, and unnecessary length of pleading arising from this course of proceeding, the practice grew up when the plaintiff was aware at the time of filing his bill of any defense which might be made to it, and had any matter to allege which might avoid the effect of such defense, to insert an allegation that the defendants pretend, or set up such and such allegations by way of defense, and then to aver the matter used to avoid it in the form of charge. This was commonly called the 'charging part' of the bill, and its introduction into practice, in all probability, led to the discontinuance of special replications, by enabling the plaintiff to state his case, and to bring forward the matter to be alleged in reply to the defense at the same time; and that, without making any admission, on the part of the plaintiff, of the truth of the defendant's case. Thus, if a bill were filed on any equitable ground, by an heir who apprehended his ancestor had made a will, he might state his title as heir, and, alleging the will by way of pretense on the part of the defendants claiming under it, make it a part of his case without admitting it." Daniell, Ch. Pl. & Prac. p. 373. As a general rule, it seems a bill in equity should combine the qualities of the declaration and the replication by anticipating the defense, and charging the matter relied upon in avoidance. M'Crea v. Purmort, 16 Wend. (N. Y.) 460. Avoidance of a special defense is pleaded by introducing the defense in the bill in the form of pretense, and adding matter of reply in the shape of a charge; and, if the bill is not so framed originally, a particular defense set up by the answer is not met by amending the bill. Connerton v. Millar, 41 Mich. 608, 2 N. W. 932. See, generally, Thomas v. Austin, 4 Barb. (N. Y.) 265; Stafford v. Brown, 4 Paige (N. Y.) 88; Freichnecht v. Meyer, 39 N. J. Eq. 551; Marshall v. Rench, 3 Del. Ch. 239; M'Crea v. Purmort, 16 Wend. (N. Y.) 460; Townshend v. Duncan, 2 Bland (Md.) 50. In Thomas v. Austin, 4 Barb. (N. Y.) 265,

Stating and Charging Parts Distinguished.

"Hence we may collect that the difference between the stating and charging parts of the bill is that the first is confined to simply unfolding the nature of the relation clearly and concisely, containing such matters of inducement as are requisite for explanation and for deducing the title. The latter is used for the purpose of adding all such further facts and allegations which cannot be conveniently inserted in the statement, and which yet are material, either to extract admissions from the defendant, or to obtain collateral relief, or, lastly, to anticipate the defense." [7]

Ultimate Facts Stated Only in Charging Part.

In a properly constructed bill, all the facts material to complainant's case will find their more appropriate place in the narrative or stating part of the bill, for there ought, first, to be an equitable case averred, and then the pretenses and charges may properly be introduced to support it.[8] Thus a bill has been held bad on demurrer where some of the ultimate constitutive facts were stated only in the charging part, and thus consisted only of the pretenses, the charges in answer to those pretenses, and the admissions.[9] But there does not seem to be any rule of law requiring material facts to be averred in the stating part, and thus to precede what is tech-

273, which was a bill to enforce specific performance of an agreement to convey land, a payment upon the agreed purchase price was stated by way of charge. The court said: "There is no force in the suggestion that this fact is alleged in the charging and not in the stating part of the bill. It is stated in its appropriate place, and furnishes one of the few instances in which the statement of a fact is legitimately reserved for the charging part of the bill. But it is just as much a part of the plaintiff's case, and, if the statement be untrue, the party is just as liable to an indictment for perjury, and the defendant is just as much bound to answer it, as though it had been alleged in the stating part of the bill." A false averment in the charging part of a sworn bill is perjury. Smith v. Clark, 4 Paige (N. Y.) 368.

[7] Lube, Eq. Pl. § 238. "It is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter which it is not for the interest of the plaintiff to admit, for which purpose the charge of the pretense of the defendant is held to be sufficient." Story, Eq. Pl. § 31, citing Partridge v. Haycraft, 11 Ves. 575; Gregory v. Molesworth, 3 Atk. 626.

[8] Story, Eq. Pl. §§ 32, 33.

[9] Story, Eq. Pl. § 32; Coop. Eq. Pl. 11; Flint v. Field, 2 Anstr. 543.

nically called the "charging part" of the bill.[10] It is conceived that the question turns upon the form of the averment. If it consists merely in an allegation that the defendant sets up certain pretenses, followed by a general charge that the contrary of those pretenses is the truth, the allegation is insufficient, for such general denial is not of itself an allegation of the facts which make up the counter statement.[11] But if the existence of the facts themselves is spe-

[10] Story, Eq. Pl. (8th Ed.) § 32a. In Wright v. Dame, 22 Pick. (Mass.) 55, 59, the court said: "It has been argued that the defect may be supplied, or the meaning of the stating part may be explained, by the averments in the charging part of the bill. But the rules of pleading require that every material averment that is necessary to entitle the plaintiff to the relief prayed for must be contained in the stating part of the bill; and this is a useful rule for the preservation of form and order in the pleadings. This part of the bill must contain the plaintiff's case, and his title to relief: and every necessary fact must be distinctly and expressly averred, and not in a loose and indeterminate manner, to be explained by inference, or by reference to other parts of the bill. The defendants are not bound to answer any averment not contained in the stating part of the bill." This last proposition goes too far, and is not true. Defendant must answer the whole bill. Otherwise the charging part would have no effect to compel a discovery. See Langd. Eq. Pl. § 57; Lube, Eq. Pl. §§ 236–238; Story, Eq. Pl. (8th Ed.) § 32a. See, also, Savannah & M. R. Co. v. Lancaster, 62 Ala. 555.

[11] Daniell, Ch. Pl. & Prac. 360; Flint v. Field, 2 Anstr. 543; Houghton v. Reynolds, 2 Hare, 267, 7 Jur. 414; Clark v. Lord Rivers, L. R. 5 Eq. 91; Rice v. Hosiery Co., 56 N. H. 114, 125. In Houghton v. Reynolds, 2 Hare, 264, 267, Mr. Vice Chancellor Wigram, referring to the case of Flint v. Field, 2 Anstr. 543, said: "I do not impeach the decision in Anstruther; but that case is not an authority for the proposition that a fact introduced by way of a charge in the bill is not as well pleaded as if it were introduced in the shape of what is technically called a 'statement.' It merely decides that an allegation that the defendant sets up certain pretenses, followed by a charge that the contrary of such pretenses is the truth, is not, of itself, an allegation or averment of the facts which make up the counter statement. I have no doubt that such a form of pleading—not specifically averring the facts themselves—would be defective, but there is no rule that every material fact must precede what is termed the 'charging part' of the bill." This seems conformable to what is laid down by Lord Redesdale in his work on Equity Pleadings. Mitf. Eq. Pl., by Jeremy (4th Ed.) p. 43. Mr. Cooper (Coop. Eq. Pl. 11), however, lays down, as a general rule, that the equity of the plaintiff's case should generally appear in the stating part of the bill, and relies for the position on Flint v. Field, 2 Anstr. 543. The decisions of Lord Hardwicke in Duncalf v. Blake, 1 Atk. 52, and Gregory v. Molesworth, 3 Atk. 626, and Attorney General v. Whorwood, 1 Ves. Sr. 534, 538, seem certainly to favor the opinion of Mr. Vice Chancellor Wigram. See,

cifically averred, although by way of charge, the allegation is sufficient to support the bill.[12] "In fact, it being a question of arrangement only, much must be left to the sagacity and discretion of the draftsman in determining which part of the bill he shall choose for making any particular statement, since the pretenses and charges are made a separate part of the bill, more for the sake of the 'lucidus ordo' than from any real distinction existing, other than that we have noticed above. In many cases, therefore, this part may be altogether passed over, and the foregoing observations will serve to instruct the pupil when charges should be introduced and when they may be omitted."[13]

Charging Part Convenient, but not Essential.

The introduction of the charging part as a distinct allegation of the bill is of comparatively recent origin. Though frequently convenient, it is never essential.[14] Lord Eldon believed that the interrogating part had its birth before the charging part, and he said that Lord Kenyon would never put in the charging part, on the ground that it does little more than enlarge and unfold the statement.[15] It is certainly true that the stating part may be made to perform the office of the charging part, for the defendant is required to answer the whole bill,—the stating part as well as the charging part,—but it sometimes tends to clearness to keep the two parts of the bill distinct. The insertion of the detailed statements of evidence necessary to extract a discovery, and of pretenses and charges to anticipate and avoid a defense, indiscriminately with the state-

also, Mayor, etc., of London v. Levy, 8 Ves. 398; 1 Daniell, Ch. Pl. & Prac. 485. The truth is that, in reports generally, the language that there is such a charge in the bill, or that such facts are charged in the bill, is not intended to be applied to the "charging part" of the bill, technically so called, but imports only that the charge is averred or the facts are alleged and stated in the bill.

12 Story, Eq. Pl. (8th Ed.) § 32a. In pleading, a statement of matters of fact in the form of charge is sufficient, on general demurrer, where it is evident that a statement by way of allegation or averment was intended by the pleader. Johnson v. Helmstaedter, 30 N. J. Eq. 124.

13 Lube, Eq. Pl. § 238.

14 Story, Eq. Pl. § 33; Townshend v. Duncan, 2 Bland (Md.) 50. In some jurisdictions, by rule of court or statute, the charging part may or must be omitted. See U. S. Eq. Rule 21; Ch. Rule 3 (38 N. H. 605); Ala. Code, § 3422; Ch. Rule 1 (37 Me. 581).

15 Partridge v. Haycraft, 11 Ves. 574.

ment of the facts constituting the grievance complained of, is apt to interrupt the course of the statement, and "render that confused the chief quality of which should be clearness and intelligibility." [16]

124. THE AVERMENT OF JURISDICTION—The sixth formal part of a bill is called the "jurisdiction" clause. It consists of an averment that the acts complained of are contrary to equity, and injure the plaintiff, and that he has no adequate remedy save in a court of equity.

125. This clause is wholly useless, and may be omitted.

The sixth part of the bill is what is called the "jurisdiction clause," and is intended to give jurisdiction of the suit to the court by a general averment that the acts complained of are contrary to equity, and tend to the injury of the plaintiff, and that he has no remedy, or not a complete remedy, without the assistance of a court of equity. But this clause is wholly unnecessary, for it will not, of itself, give jurisdiction to the court. If the case made by the bill is otherwise clearly of equitable jurisdiction, the court will sustain it, although the clause is omitted. If, on the contrary, the case so made is not of equitable jurisdiction, the bill will be dismissed notwithstanding such an averment is made in it; for the court cannot assume any jurisdiction, except upon cases and principles which clearly justify its interposition. At best, therefore, the clause is a mere superfluity.[1]

[16] Lube, Eq. Pl. § 237.

§§ 124–125. [1] Story, Eq. Pl. § 34; Daniell, Ch. Pl. & Prac. 374; Botsford v. Beers, 11 Conn. 369; Marshall v. Rench, 3 Del. Ch. 239; Gage v. Kaufman, 133 U. S. 471, 10 Sup. Ct. 406; U. S. Eq. Rule 21; Ch. Rule 3 (38 N. H. 605); Ala. Code 1886, § 3422; Tenn. Code (Mill. & V.) § 5057; Bateman v. Willoe, 1 Schoales & L. 204; Chase v. Palmer, 25 Me. 341; Ridgeway v. Toram, 2 Md. Ch. 303. The bill need not show that there is no remedy at law where it is obvious that the injunction which it asks is the only adequate remedy. Middleton v. Flat River Booming Co., 27 Mich. 533. A bill for discovery and relief on a demand not cognizable in equity, the only ground of jurisdiction being the need of discovery, must state that discovery is indispensable for want of other evidence; and, if it appears therefrom or from the proof that plaintiff has other adequate evidence, it will be dismissed. Thompson v. Iron Co., 41 W. Va. 574, 23 S. E. 795.

126. THE INTERROGATING PART—The seventh formal part of a bill is called the "interrogating" part. It requires the defendant to answer the allegations and charges of the bill, and may be in form either

(a) General, or

(b) Special.

127. A general interrogatory in form prays a subpœna "to the end that the defendant may full answer make to all and singular the premises as fully and completely as if the same were repeated and he specially interrogated thereto."

128. Special interrogatories begin with the form of a general interrogatory, and then continue as follows: "And that more especially said confederates may, in manner aforesaid, answer and set forth whether," etc.; repeating, by way of interrogatory, the matters most essential to be answered, and adding to the inquiry after each fact an inquiry as to the attendant circumstances and the variations to which it may be subject.

129. Interrogatories must in all cases be confined to the substantive charge or allegation; the complainant cannot compel a discovery of a distinct matter not included in the allegation or charge.

The seventh formal part of the bill is the interrogating part. It prays that the parties complained of may answer all the matters contained in the former parts of the bill, not only according to their positive knowledge of the facts stated, but also according to their remembrance, to the information they may have received, and to the belief they are enabled to form on the subject.[1] One of the principal ends of an answer upon the part of the defendant is to supply proof of the matters necessary to support the case of the complainant; and it is therefore required of the defendant either to

§§ 126–129. [1] See ante, p. 179, for form of clause.

admit or to deny all the facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare himself unable to form any belief concerning it. And this he ought to do fully and explicitly, even though no special interrogatories should follow in the bill.[2] But, as experience has proved that the substance of the matters stated and charged in a bill may frequently be evaded by answering according to the letter only, it has become a practice to add, to the general requisition that the defendant should answer the contents of the bill, a repetition, by way of interrogatory, of the matters most essential to be answered, adding to the inquiry after each fact an inquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion and compel a full answer.[3]

[2] In the ancient forms, the bill, after the general prayer that the defendants may, upon oath, make a full, due, and perfect answer to all the charges in matter contained in the bill, closed with a prayer for relief and process, without putting any special interrogatories, as this general requisition was supposed sufficient to compel a full answer. Bart. Suit in Eq. 46. Where a fact is stated in a bill by way of recital merely, without any interrogatory calling for an answer as to that fact, the defendant is not bound either to admit or to deny the same. Mechanics' Bank v. Levy, 3 Paige, 606. A defendant in a bill of equity which contains a general interrogatory must answer all the material allegations and charges in the bill, whether specially interrogated thereto or not. Miles v. Miles, 27 N. H. 440; Methodist Episcopal Church v. Jaques, 1 Johns. Ch. 75. A prayer that each of the defendants may be required to answer under the premises, in a bill for relief, being a good general interrogatory, complainants are entitled to an answer to every material allegation of the bill. McClaskey v. Barr, 40 Fed. 559; Ames v. King, 9 Allen (Mass.) 258. Interrogatories, though not indispensable to a bill in equity, become a part of it when founded on a matter contained in the charging part of the bill, and the defendant is compellable to answer the allegations or interrogatories. Eberly v. Groff, 21 Pa. St. 251. See, also, Marshall v. Rench, 3 Del. Ch. 239; Kisor v. Stancifer, Wright (Ohio) 323. But see Shed v. Garfield, 5 Vt. 41. Bills for relief may also contain prayers for the discovery of facts which are essential to the relief prayed for in the bill. Wick v. Dawson (W. Va.) 24 S. E. 587.

[3] Coop. Eq. Pl. 12; Bart. Suit in Eq. p. 46; Story, Eq. Pl. § 35. In drawing a bill, it is well, in order to prevent evasion, to insert specific interrogatories concerning the matters considered to be the most essential; yet, under the general interrogatory, an answer is open to exception if it omits to answer material charges and statements in a bill concerning which no specific interrogatories are introduced. Miles v. Miles, 27 N. H. 440.

Hence it is called the "interrogating" part of the bill, since it questions the defendant as to the truth of the several statements and charges in the bill.

The interrogating part of the bill being originally designed and used to compel a full answer to the matters contained in the former part of the bill, it must be founded on these matters.[4] Therefore, if there is nothing in the prior part of the bill to warrant a particular interrogatory, the defendant is not compellable to answer it.[5] This rule is indispensable for the preservation of due form and order in the pleadings, and particularly to keep the answer to the matters put in issue by the bill.[6] When, therefore, a question arises upon the sufficiency of the answer, we are to examine and see whether the allegations in the bill justify the interrogatory, and, of course, impose the necessity of answering it; for the interrogating part must be constructed according to the alleging part, and is not to be considered more extensive than the propositions out of which the interrogatories arise.[7] But although the defendant is not bound to an-

[4] "The great object of the interrogating part of the bill is therefore to preclude evasiveness in the answer; and the whole attention of the draftsman must be turned to this single point of putting the question in every variety of form, to elicit a full and definite reply, and to prevent the defendant's having any loophole to escape upon a negative pregnant. In fact, this part of the bill is altogether subservient to the office which the bill performs, of an examination, and should therefore omit nothing essential to the proof and elucidation of the statement; but as the substance of the bill is, in fact, the thing to be answered, and the interrogatories are only permitted for the sake of convenience, no question can be put which is not immediately dependent on, or relevant to, a particular statement or charge in the bill." Lube, Eq. Pl. § 241; Muckleston v. Brown, 6 Ves. 52, 62, 63; Faulder v. Stuart, 11 Ves. 296, 302. Interrogatories must be confined to the matters set up in the bill. Gormully & Jeffery Manuf'g Co. v. Bretz, 64 Fed. 612.

[5] Story, Eq. Pl. § 36; Cowles v. Buchanan, 3 Ired. Eq. (N. C.) 374; Fuller v. Knapp, 24 Fed. 100; Grim v. Wheeler, 3 Edw. Ch. (N. Y.) 334. The defendant is not bound to answer an interrogatory, unless the same is founded upon some allegation or charge in the bill. It is sufficient, however, if the interrogatory is founded upon a statement in the bill which is inserted therein merely as evidence in support of the main charges. Mechanics' Bank v. Levy, 3 Paige, 606.

[6] Muckleston v. Brown, 6 Ves. 52, 62.

[7] Muckleston v. Brown, 6 Ves. 52, 62; Attorney General v. Whorwood, 1 Ves. Sr. 534, 538; Bullock v. Richardson, 11 Ves. 373, 375; Woodcock v. Bennet, 1 Cow. (N. Y.) 711, 734; James v. McKernon, 6 Johns. (N. Y.) 543; Mechanics'

swer an interrogatory which does not grow out of the antecedent matter stated or charged in the bill, yet if he does answer it, and the answer is replied to, the matter of the interrogatory is deemed to be put in issue, and the informality is cured.[8]

But a variety of questions may be founded on a single charge in the bill, if they are relevant to it; and, under an allegation of a fact, interrogatories may be put as to the incidental circumstances, although they may not as to any distinct subject.[9] Thus, for example, if there is a general charge that money has been paid as a consideration of a contract, that general charge will entitle the complainant to put all questions upon it which are material to make out that it was paid, how, when, where, by whom, on what account, in what sums, etc.; and it is not necessary to load the bill, by adding to the general charge that it was paid, all the circumstances, in order to justify an interroga-

Bank v. Levy, 3 Paige (N. Y.) 606. A defect in the charging part of a bill cannot be supplied by a subsequent interrogatory, and the interrogatories are to be construed by the charging part of the bill. Mechanics' Bank v. Levy, 3 Paige (N. Y.) 606; Kisor v. Stancifer, Wright (Ohio) 323; Cowles v. Buchanan, 3 Ired. Eq. (N. C.) 374; Parker v. Carter, 4 Munf. (Va.) 273. See, also, Nolley v. Rogers, 22 Ark. 227. Cf. Lingan v. Henderson, 1 Bland (Md.) 249.

[8] Attorney General v. Whorwood, 1 Ves. Sr. 538.

[9] Faulder v. Stuart, 11 Ves. 296; Bullock v. Richardson, Id. 373, 375; Fuller v. Knapp, 24 Fed. 100; Mechanics' Bank v. Levy, 3 Paige (N. Y.) 606; Uhlmann v. Brewing Co., 41 Fed. 369. "Although, on the authority of the cases above cited, it appears that a plaintiff might formerly ask all questions necessary to make out a general allegation in the bill, yet, in point of fact, it was the common practice to make the interrogating part an exact echo of the charging and stating part of the bill. Now, however, this practice is not so strictly adhered to; for, modern bills being so much more concise than bills formerly were, it is often necessary or desirable in the interrogatories to inquire after particulars included in a general allegation in the bill. And it would seem that to some extent, at least, the old rule requiring an allegation in the bill, as a foundation of the interrogatories, has been relaxed. * * * It has also been determined that, under the new practice, it is not necessary to introduce in the bill allegations suggesting imaginary facts, in order to found an interrogatory. Thus when a bill alleged the existence of a mortgage known to the plaintiff, but did not allege that there were others, an interrogatory whether there were others was allowed." Daniell, Ch. Pl. & Prac. 484. Interrogatories are not to be framed and limited upon the theory that everything stated in the bill is precisely and in every detail true. Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. 18.

tory as to the circumstances.[10] So, if bill is filed against an executor for an account of the personal estate of the testator, upon the single charge that he has proved the will may be founded every inquiry which may be necessary to ascertain the amount of the estate, its value, the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstance leading to the account required.[11]

It is clear, from what has been already said, that the interrogating part of the bill is not absolutely necessary; because, if the defendant fully answers to the matters of the bill, with their attendant circumstances, or fully denies them in the proper manner on oath, the object of the special interrogatories is completely accomplished.[12] In the

[10] Story, Eq. Pl. § 37; Faulder v. Stuart, 11 Ves. 296; Bullock v. Richardson, Id. 375.

[11] Story states this proposition on the authority of Lord Redesdale, but expresses a doubt as to whether it is not stated too broadly, and thinks that there should be a charge, not only that the executor had proved the will, but that he had received assets, in order to found the interrogatories. Story, Eq. Pl. § 37, note 2.

[12] See ante, note 2. In many jurisdictions the use of interrogatories is regulated by statute or rule of court. See Martin v. Hewitt, 44 Ala. 418; O'Neal v. Robinson, 45 Ala. 526. Ch. Rule 13, requiring complainant to point out what shall be answered, is complied with by a footnote to the bill requiring answer to the allegations in paragraphs numbered from 1 to 5, inclusive. Paige v. Broadfoot, 100 Ala. 610, 13 South. 426. Such rule is also complied with by a note requiring defendant "to answer all the statements of the above bill." McKenzie v. Baldridge, 49 Ala. 564. In Thornton v. Railroad Co., 84 Ala. 109, 4 South. 197, the court said the above rule had no application to bills containing no interrogating part, and, like the forms of the complaint given in the Code, is, at most, directory. In Maine, Ch. Rule 1 (37 Me. 581) provides that "a general interrogatory only shall be introduced, and it shall be sufficient to require a full answer to all the matters alleged." In New Hampshire, Ch. Rule 3 (38 N. H. 605) provides that "the prayer for an answer and for answers to interrogatories, except where the plaintiff relies on the discovery of the defendant," may be omitted. An application to the court for relief in equity, which does not contain a prayer for process to be served on the defendant, or conclude with a general interrogatory, may be regarded as a bill, and, if properly amended, relief may be granted upon it. Belknap v. Stone, 1 Allen (Mass.) 572. In Amy v. Manning, 149 Mass. 487, 21 N. E. 943, the court said that under St. 1883, c. 223, § 10, "if the bill asks for relief, the answer cannot be sworn to, and discovery can only be had by interrogatories to the defendant, as in actions at law." For practice in federal courts, see post, p. 218. In England it is provided by

old forms of bills there accordingly were no special interrogatories. But, from the considerations already mentioned, the insertion of special interrogatories is often highly useful to sift the conscience of the defendant.[13] In truth, without such interrogatories, it would be impracticable, in many cases, to extract from a reluctant defendant the facts and circumstances, so as to justify any decree.[14]

Thus it is seen that the peculiar office of the charging and interrogating parts of a bill is to compel a discovery. They are properly supplementary to each other. In many cases, if the charges of evidence are detailed and specific, these, in connection with merely the general interrogatory, will produce the desired discovery. In other cases, where special interrogatories are used, the foundation of such interrogatories should be laid in the charging part, for, as has been seen, no question can be put which is not immediately dependent upon or relevant to a particular statement or charge in the bill.[15] With the ex-

statute that the bill of complaint shall not contain any interrogatories for the examination of the defendant, and, by the fifteenth and following general orders in chancery, provision is made for the examination of defendant upon separate interrogatories. See Daniell, Ch. Pl. & Prac. p. 374, and notes. In Romaine v. Hendrickson's Ex'rs, 24 N. J. Eq. 231, the bill prayed an answer to interrogatories annexed to it, and it was held that such interrogatories should be regarded as incorporated in the bill by such reference. See, also, Amy v. Manning, 149 Mass. 487, 21 N. E. 943.

[13] Story, Eq. Pl. § 35, and notes.

[14] "It is very doubtful whether a pure bill of discovery in an equity suit would lie at the present day. It may be that a discovery might be asked for in a bill for relief; but it is probable that no prudent counsel, understanding what must be the effect, would at this day file a pure bill of discovery, or call for a discovery in a bill for relief, and thus unnecessarily give the defendant an advantage which he would not otherwise have under our present practice, which enables a complainant to place the defendant upon the stand and examine him as a witness, and thereby obtain his testimony much more judiciously,—testimony of a character less prejudicial to his client's interests than it would be were the testimony to come in the form of a sworn answer, strained through the legal cullender of his counsel, and by him shaped and shaded in his office at his leisure. Very wisely, I think the bill in the present case has been made a bill for relief, not a bill of discovery. See Slessinger v. Buckingham, 8 Sawy. 469, 17 Fed. 454." U. S. v. McLaughlin, 24 Fed. 823, 825.

[15] The complainant should state in the charging part the anticipated defense as a pretense of the defendant, and then charge the real facts to lay a foundation for the discovery which is sought. Stafford v. Brown, 4 Paige (N. Y.) 88.

ception of these two parts, all the other parts of the bill pertain to it in its character as a pleading.

United States Equity Rules.

The practice in the federal courts as to the use of interrogatories is governed by the United States equity rules. Rule 40 provides that it shall not be necessary to interrogate defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.[16] Rule 41 provides that the interroga-

[16] Rule 40 originally provided that a defendant need not answer any statement or charge in the bill unless specially and particularly interrogated thereto. The effect of this rule was to make the use of special interrogatories essential in every case where a discovery was desired. See Treadwell v. Cleveland, 3 McLean, 283, Fed. Cas. No. 14,155; Parsons v. Cumming, 1 Woods, 461, Fed. Cas. No. 10,775; Bailey Washing Mach. Co. v. Young, 12 Blatchf. 199, 1 Ban. & A. 362, and Fed. Cas. No. 751; Langdon v. Goddard, 3 Story, 13, Fed. Cas. No. 8,061; Young v. Grundy, 6 Cranch, 51. Indeed, in Treadwell v. Cleveland, supra, it was intimated that, under the rule, special interrogatories were required in every case. The court said: "By the fortieth rule it is declared 'that a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto.' The above bill contains no such interrogatory. And it is very questionable whether the defendant can be in default for not answering a bill which, under the above rule, he is not bound to answer. The bill is clearly demurrable on this ground." In Shed v. Garfield, 5 Vt. 39, 41, the bill was demurred to upon the ground, inter alia, that the bill, by including no interrogatories to the respondents, thereby precluded them from the benefit of their answer under oath. The court, while overruling this contention, said: "But there are cases in which the discovery sought, and the allegation of the want of other testimony to prove the parts necessary for relief, alone give jurisdiction to a court of equity. In such cases, an omission of the interrogatories in the bill must, of course, be fatal, and we do not feel willing to dispense with them in any case. They make a part of all the forms that come to us from the English practice, and that practice has prevailed in this state, and is almost confirmed by our statute. If the demurrer had been taken for this defect only, the same must have been allowed. But this demurrer covers other grounds not tenable." In Bailey Washing Mach. Co. v. Young, supra, it was said that the bill in that case was not a bill of discovery, since the defendants were not, under the rules, bound to answer any averment therein except at their option, and because the complainant had propounded no interrogatories, as required by the rule, when he desired to enforce a discovery. In Parsons v. Cumming, supra, the court said that where discovery is the object, or a principal object, distinct interrogatories should be affixed to the bill, and that a general answer is sufficient for a general allegation. "The defendant is not bound to exercise ingenuity in finding out all the

tories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc., and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill.[17] An example of a bill drawn in conformity with these rules has been previously given.[18] Rule 42 provides that "the note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill." Rule 43 provides as follows: "Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words, 'To the end thereof,' there shall hereafter be used words in the form or to the effect following: 'To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer; that is to say: (1) Whether,' etc. '(2) Whether,' etc."

aspects in which a statement may be taken." In 1850 the fortieth rule was repealed, and the rule as stated in the text was substituted therefor. This brought the practice back into substantial conformity with the ancient chancery practice. That is to say, even when there are no specific interrogatories, the defendants are still bound to answer, either admitting or denying every part of the bill, as if they had been specifically interrogated thereabout. Fost. Fed. Prac. (2d Ed.) § 82. In McClaskey v. Barr, 40 Fed. 559, 560, the court said that under the fortieth equity rule special interrogatories are not necessary excepting where the bill is for discovery merely, and that a general prayer that defendants be required "to answer unto the premises" was a good general interrogatory, and sufficient, in a bill for relief and incidental discovery, to compel an answer. In U. S. v. McLaughlin, 24 Fed. 823, 824, the court said: "In our present practice, under the provisions of Eq. Rules 41–43, which permit a complainant, if he desires, to file interrogatories and prescribe the form to be followed, I apprehend that a general interrogatory would be insufficient."

[17] The thirteenth chancery rule in Alabama is substantially the same. For the construction given it by the Alabama court, see cases cited ante, note 12.

[18] See ante, p. 179.

130. THE PRAYER FOR RELIEF—The eighth formal part of a bill is called the "prayer for relief," and consists of a petition or request to the court to decree the appropriate relief.

131. The prayer for relief may be either
(a) Special, or
(b) General.

132. The prayer for special relief enumerates and asks for the particular relief to which the complainant considers himself entitled.

133. The prayer for general relief asks, in general terms, for such relief in the premises as shall be agreeable to equity.

134. Under a special prayer alone, only such relief will be granted as is specially prayed for.

135. Under a general prayer alone, any relief may be granted, other than an interlocutory order, which is consistent with and grounded upon the allegations of the bill.

136. Under a prayer for both special and general relief, any relief may be given which either prayer alone would justify, except,

EXCEPTION—No relief can be granted which is entirely distinct from, and independent of, or inconsistent with, that specially prayed for.

137. The usual and safest course is to pray for both general and special relief. In the federal courts this rule is imperative.

138. If the prayer for relief is omitted, or if the allegations do not entitle complainant to the relief prayed for, the bill is demurrable.

139. Offers and waivers by the complainant are usually inserted in this part of the bill, though they may also be included in the stating part.

Following the interrogatory part of the bill, when that is used, and equally important with the stating part or premises, comes the formal prayer or request of the complainant for the relief he seeks. This is one of the real essentials of the bill, and without it no decree can be rendered in favor of complainant.[1] It may be made either by a general prayer, under which any relief may be granted which the complainant's case, as stated and proved, will justify,[2] except special writs, such as

§§ 130–139. [1] Driver v. Fortner, 5 Port. (Ala.) 9; Perry v. Perry, 65 Me. 399; Dews v. Cornish, 20 Ark. 332. A bill in chancery which makes out a case for a specific execution of an award, but does not pray for general or special relief, is sufficient if no objection be taken by the defendant, and he answers on the merits of the complaint and submits himself to the decree of the court. Smith v. Smith, 4 Rand. (Va.) 95. If a bill is sufficient in substance, and the prayer only is artificially drawn, the defendant should demur. The defect not being one of substance, if he answers, it is waived. Kuchenbeiser v. Beckert, 41 Ill. 172. In the cases of bills for charities and bills on behalf of infants, courts of equity will grant relief upon any matter arising upon the state of the case, though it be not particularly mentioned and insisted on and prayed by the bill. Stapilton v. Stapilton, 1 Atk. 6; Attorney General v. Jeanes, Id. 355; Attorney General v. Scott, 1 Ves. Sr. 413, 418; Story, Eq. Pl. § 40, note 1. Where the general and specific prayer of a bill is sufficient to meet the principal object of the complainant, the prayer is sufficient. Webster v. Harris, 16 Ohio, 490. A prayer assigning several reasons for vacating a deed is considered as so many separate prayers, and, if one reason be valid, it is error to reject the whole prayer. American Exchange Bank v. Inloes, 7 Md. 380. Where the want of interest in one of several complainants is discovered at the hearing of the bill, in which several and not joint relief is prayed, the bill will not be dismissed, but relief will be granted to those in interest; otherwise where joint relief is prayed. Henderson v. Peck, 3 Humph. (Tenn.) 247.

[2] See Hobson v. McArthur, 16 Pet. 182; Gibson v. McCormick, 10 Gill & J. (Md.) 65; James v. Bird's Adm'r, 8 Leigh (Va.) 510; Barraque v. Manuel, 7 Ark. 516; Shields v. Trammell, 19 Ark. 51; Hubbard v. Mortgage Co., 14 Ill. App. 40; Haworth v. Taylor, 108 Ill. 275; Dodd v. Benthal, 4 Heisk. (Tenn.) 601; Crain v. Barnes, 1 Md. Ch. 151, 156; Kelly v. Payne, 18 Ala. 371; Danforth v. Smith, 23 Vt. 247; Bullock v. Adams' Ex'rs, 20 N. J. Eq. 367. Rescission of contract: Prewit v. Graves, 5 J. J. Marsh. (Ky.) 114; Bolware v. Craig, Litt. Sel. Cas. (Ky.) 407. See, also, Crow v. Railroad Co., 82 Ky. 134. Damages for injury by trespass before injunction issued to prevent multiplicity of suits. Winslow v. Nayson, 113 Mass. 411; Whipple v. Village of Fair Haven, 63 Vt. 221, 21 Atl. 533; Omaha Horse Ry. Co. v. Cable Tramway Co., 32 Fed. 727. A prayer for general relief is a prayer for any relief the court can give, except by injunction, upon the facts averred in the bill. Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. 18. Under the prayer for general relief,

injunctions, or writs of ne exeat regno, or special orders pending the suit, as for the transfer of funds or the protection of property;[8] or it may be by a special prayer pointing out, in detail, the particular mat-

in a bill, only such relief can be granted as the case stated in the bill, and sustained by the proof, will justify. Hobson v. McArthur, 16 Pet. 182; Gibson v. McCormick, 10 Gill & J. (Md.) 65; Lingan v. Henderson, 1 Bland (Md.) 236; James v. Bird's Adm'r, 8 Leigh (Va.) 510; Barraque v. Manuel, 7 Ark. 516; McConnel v. Gibson, 12 Ill. 128; Strother v. Lovejoy, 8 B. Mon. (Ky.) 135; Townshend v. Duncan, 2 Bland (Md.) 45; Thayer v. Lane, Walk. (Mich.) 200; Moran v. Palmer, 13 Mich. 367; McNair v. Biddle, 8 Mo. 257; Craige v. Craige, 6 Ired. Eq. (N. C.) 191; Miller v. Furse, Bailey, Eq. (S. C.) 187; White v. Yaw, 7 Vt. 357; Sheppard v. Starke, 3 Munf. (Va.) 29. A prayer for general relief is sufficient, and will entitle the complainant, on the final hearing, to such a decree as his case may warrant. Kelly v. Payne, 18 Ala. 371; Jones v. Bush, 4 Har. (Del.) 1; Brown v. McDonald, 1 Hill, Eq. (S. C.) 297; Danforth v. Smith, 23 Vt. 247; Franklin v. Greene, 2 Allen (Mass.) 519. A prayer for general relief is sufficient to support any decree warranted by the allegations of the bill. Walker v. Converse, 148 Ill. 622, 36 N. E. 202. "It is frequently said that a special prayer is never actually necessary, but that is a mistake. As the defendant is entitled to know what facts the plaintiff intends to prove, in order that he may not be taken by surprise, so he is entitled to know, for the same reason, what use the plaintiff intends to make of his facts. Whenever, therefore, the plaintiff seeks any relief which does not clearly and obviously result from the facts stated in the bill, he must pray for it specially. It is always advisable to combine a general prayer with a special one, for the former will cure any slight omissions or deficiencies in the latter, but of course it will not enable the plaintiff to obtain any relief of which the special prayer has not fairly apprised the defendant. Indeed, a general prayer alone is better than a special prayer combined with a general prayer, unless the special prayer is substantially correct." Langd. Eq. Pl. (2d Ed.) p. 60. A bill by one partner against another prayed that the defendant might be required to render a just account of all moneys received by him, etc., and also "of all other matters relating to said concern." Held, that this last clause was equivalent to a prayer for general relief. Miller v. Lord, 11 Pick. (Mass.) 11.

[8] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 388, 389. Injunctions: African M. E. Church v. Conover, 27 N. J. Eq. 157; Willett v. Woodhams, 1 Ill. App. 411; Kelly v. Payne, 18 Ala. 371, 374; Lewiston Falls Manuf'g Co. v. Franklin Co., 54 Me. 402; Wright v. Atkyns, 1 Ves. & B. 313, 314; Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. 18. "There is also another fatal objection to the granting of a preliminary injunction, in this case, which was not adverted to on the argument, which is that there is no prayer for such process in the complainant's bill. A final injunction may be obtained upon the prayer for relief by injunction, or perhaps under the prayer for general relief. But, to obtain a preliminary injunction to restrain the defendants' proceedings pend-

ters to be decreed.[4] It is the common practice, however, to pray for relief specifically, following this with the general prayer for such other and further relief as the nature of the case may require, for the reason that the complainant, if he mistakes the relief to which he is entitled and omits the general prayer, might be left helpless unless allowed to amend,[5] while, if the latter follows, any specific relief may be granted under it consistent with the case stated in the bill[6] and with that al-

ing the suit, there should be a formal prayer for such process, or some other prayer which is equivalent. Thus, in the case of Wood v. Beadell, 3 Sim. 273, an injunction was asked for, as here, in the general prayer of the bill, but, as there was no preliminary injunction asked for in the prayer of process, such injunction was refused. The complainant, however, was permitted to renew his application upon an amended bill." Walker v. Devereaux, 4 Paige (N. Y.) 229, 248. See, also, Savory v. Dyer, Anb. 70; Daville v. Peacock, Barnard. Ch. 25, 27; Thompson v. Heywood, 129 Mass. 401, 404; Wood v. Beadell, 3 Sim. 273. Ne exeat: Story, Eq. Pl. § 40; Kelly v. Payne, 18 Ala. 371, 374; Shainwald v. Lewis, 46 Fed. 839. It is sufficient if the facts alleged in the bill show a proper case for the writ, and it may be granted in the decree under the prayer for general relief. Or the facts may be shown and a writ applied for upon a petition presented in the case either before or after judgment or decree. Lewis v. Shainwald, 7 Sawy. 403, 48 Fed. 492. Receivers: Prayer not necessary where facts stated authorize appointment. See Merchants' Nat. Bank v. Raymond, 27 Wis. 567, 571; Ladd v. Harvey, 21 N. H. 514, 521; Henshaw v. Wells, 9 Humph. (Tenn.) 568, 584; Commercial & Sav. Bank v. Corbett, 5 Sawy. 172, 177, Fed. Cas. No. 3,057; Clyburn v. Reynolds, 31 S. C. 91, 9 S. E. 973; Connelly v. Dickson, 76 Ind. 440, 444.

[4] Story, Eq. Pl. § 40.

[5] Story, Eq. Pl. (10th Ed.) § 40; Cook v. Martyn, 2 Atk. 2; Palk v. Clinton, 12 Ves. 48, 62; Driver v. Fortner, 5 Port. (Ala.) 9; Morrison v. Bowman, 29 Cal. 337; Peck v. Peck, 9 Yerg. (Tenn.) 301; Halsted v. Meeker's Ex'rs, 18 N. J. Eq. 136; Mundy's Landing & H. Turnpike Co. v. Hardin (Ky.) 20 S. W. 385; Johnson v. Mantz, 69 Iowa, 710, 27 N. W. 467; Townshend v. Duncan, 2 Bland (Md.) 45; Lingan v. Henderson, 1 Bland (Md.) 252; Dews v. Cornish, 20 Ark. 332; Wyatt v. Greer, 4 Stew. & P. (Ala.) 318. As to amendment in such cases, see Townshend v. Duncan, 2 Bland (Md.) 45; Halsted v. Meeker's Ex'rs, 18 N. J. Eq. 136; Adams v. Milling Co., 36 Fed. 212; Laird v. Boyle, 2 Wis. 431; McCrum v. Lee, 38 W. Va. 591, 18 S. E. 757. Under a special prayer, relief of the same general character, but less extensive, may be granted, or the prayer may be amended, if necessary. Camden Horse-Railroad Co. v. Citizens' Coach Co., 31 N. J. Eq. 525. "A suitor is not to be turned out of court for his much praying." Kupferman v. McGehee, 63 Ga. 251, 260.

[6] Fisher v. Moog, 39 Fed. 665; Finley v. Lynn, 6 Cranch, 238; Patrick v. Isenhart, 20 Fed. 339; Adams v. Milling Co., 36 Fed. 212; Tyler v. Savage,

ready specifically prayed for.[7] This method is imperative in the federal courts, the rule providing that the prayer of the bill shall ask the special relief to which the complainant supposes himself entitled, and shall also contain a prayer for general relief, and, in accordance with

143 U. S. 79, 98, 12 Sup. Ct. 340; Gormley v. Clark, 134 U. S. 338, 350, 10 Sup. Ct. 554; Tayloe v. Insurance Co., 9 How. 390; Walker v. Converse, 148 Ill. 622, 36 N. E. 202; Davidson v. Burke, 143 Ill. 139, 32 N. E. 514; Cushman v. Bonfield, 139 Ill. 219, 28 N. E. 937; Brown v. Miner, 128 Ill. 148, 21 N. E. 223; Allen v. Woodruff, 96 Ill. 19; Isaacs v. Steel, 3 Scam. 97; Holden v. Holden, 24 Ill. App. 106; Nudd v. Powers, 136 Mass. 273; Thompson v. Heywood, 129 Mass. 401; Franklin v. Greene, 2 Allen, 519; Winslow v. Nayson, 113 Mass. 411; Dayton v. Dayton, 68 Mich. 437, 36 N. W. 209; Flanders v. Chamberlain, 24 Mich. 305; Wilkin v. Wilkin, 1 Johns. Ch. (N. Y.) 111; Innes v. Evans, 3 Edw. Ch. (N. Y.) 454; Miller v. Jamison, 24 N. J. Eq. 41; Annin v. Annin, Id. 184; Graham v. Berryman, 19 N. J. Eq. 29; Hall v. Pierce, 4 W. Va. 107; Anderson v. De Soer, 6 Grat. (Va.) 363; Raper v. Sanders, 21 Grat. (Va.) 60; Shenandoah Val. R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239; Simplot v. Simplot, 14 Iowa, 449; Shelby v. Tardy, 84 Ala. 327, 4 South. 276; Munford v. Pearce, 70 Ala. 452, 458; Stone v. Anderson, 26 N. H. 506, 522; Repplier v. Buck, 5 B. Mon. (Ky.) 96, 98; Wootten v. Burch, 2 Md. Ch. 190, 198; Townshend v. Duncan, 2 Bland (Md.) 45, 48; Powell v. Young, 45 Md. 494; Crain v. Barnes, 1 Md. Ch. 151, 156; Brown v. McDonald, 1 Hill, Eq. (S. C.) 297; Miami Exporting Co. v. United States Bank, Wright (Ohio) 249, 257; Webster v. Harris, 16 Ohio, 49; Story, Eq. Pl. (10th Ed.) 40; Cooper, Eq. Pl. 13, 14; English v. Foxall, 2 Pet. 595; Texas v. Hardenberg, 10 Wall. 68; Colton v. Ross, 2 Paige (N. Y.) 396. As to carry into effect the relief specially prayed for, Mitchell v. Moore, 95 U. S. 587; or where the particular relief has become impossible, Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 40. Cf. Chalmers v. Chambers, 6 Har. & J. (Md.) 29; Jordan v. Clark, 16 N. J. Eq. 243; Welsh v. Bayaud, 21 N. J. Eq. 186; Rigg v. Hancock, 36 N. J. Eq. 42; Mackall v. Casilear, 137 U. S. 556, 11 Sup. Ct. 178. The following cases are instances of relief under the general prayer: Specific performance: Cushman v. Bonfield, 139 Ill. 219, 28 N. E. 937; Stevens v. Guppy, 3 Russ. 171; Powell v. Young, 45 Md. 494; Kirksey v. Means, 42 Ala. 426; Shenandoah Val. R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239. Bill to redeem from mortgage: Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. 685. Bill for account and removal of trustees: Mitchell v. Moore, 95 U. S. 587. Bill to establish title and remove buildings of respondent: Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. 554. Bill by second mortgagee to set aside foreclosure sale to owner of equity: Thompson v. Heywood, 129 Mass. 401. Bill for sale of estate under charge in favor of complainant: Nudd v. Powers, 136 Mass. 273. "The general relief prayed for must be confined to the ground of jurisdiction stated in the bill."

[7] See note 7 on following page.

the accepted rule in equity proceedings generally, that writs of injunction or ne exeat, or special orders pending the suit, shall be specially prayed for.[8]

Machinists' Nat. Bank v. Field, 126 Mass. 345, 348. See, also, Welsh v. Bayaud, 21 N. J. Eq. 186. The relief granted under the general prayer must be secundum allegata et probata. See, in addition to cases cited ante, note 3, the following cases: White v. Jeffers, Clarke, Ch. (N. Y.) 206; Pennock v. Ela, 41 N. H. 189, 192; McNair v. Biddle, 8 Mo. 257; Jordan v. Clark, 16 N. J. Eq. 243; Smith v. Smith, 1 Ired. Eq. (S. C.) 83; Allen v. Car Co., 139 U. S. 662, 11 Sup. Ct. 682; Mackall v. Casilear, 137 U. S. 556, 11 Sup. Ct. 178; Wilson v. Horr, 15 Iowa, 489. See, also, post, 228.

[7] Kornegay v. Carroway, 2 Dev. Eq. (N. C.) 403; Walpole v. Orford, 3 Ves. 416; Busby v. Littlefield, 31 N. H. 193, and authorities there cited. Under the prayer for general relief, the plaintiff may have such relief as he is entitled to, without regard to any defect in the prayer for special relief. Treadwell v. Brown, 44 N. H. 551. It is no ground of demurrer that the bill prays wrong relief, where there is a prayer for general relief. Holden v. Holden, 24 Ill. App. 106; followed by Merchants' Nat. Bank v. Hogle, 25 Ill. App. 543. Cf. Hopkins v. Snedaker, 71 Ill. 449; Curyea v. Berry, 84 Ill. 600; Stanley v. Valentine, 79 Ill. 544; Wescott v. Wicks, 72 Ill. 524; Crane v. Hutchinson, 3 Ill. App. 30. Where a bill prays for specific relief "and" for general relief, a court of chancery will not be limited to the specific relief and relief of the same character on the ground that the prayer for general relief is conjunctively instead of disjunctively added. Burnett v. Boyd, 60 Miss. 627. But in Colton v. Ross, 2 Paige (N. Y.) 396, the opposite view was taken. The court said: "Another substantial objection is that the prayer for relief in this case is not in the alternative, but the last part of the relief prayed for is in addition to the prayer that the will may be declared void. Where the case made by the bill may entitle the complainant to one kind of relief or another, but not to both, the prayer should be in the disjunctive. So, if the complainant is in doubt whether the facts of his case entitle him to a specific relief prayed for, or to relief in some other form, his prayer, concluding for general relief, should be in the disjunctive. And in such a case, although he is not entitled to the relief specifically prayed for, he may, under the general prayer, obtain any other specific relief, provided it is consistent with the case made by the bill. But if a complainant prays for particular relief, and other relief in addition thereto, he can have no relief inconsistent with such particular relief, although founded upon the bill." In Dennis v. Dennis, 15 Md. 73, the court said (page 125): "The defendants have insisted that there is such an inconsistency between a claim for renting and hiring and one for cultivation that, inasmuch as the special prayer presents the former, the latter cannot be insisted upon under the general prayer, more especially so because its language is, 'and that your ora-

[8] Eq. Rule 21. If the prayer for general relief is omitted, it may be added by amendment. Adams v. Milling Co., 36 Fed. 212.

The special prayer or prayers for relief, if no general prayer is used, should, as has been seen, ask for what the complainant is entitled to upon the case stated, or the bill may be dismissed; but, when followed by the general prayer, the latter will operate to save his rights to the extent of any relief warranted by the facts alleged and proved, when the special prayers are too narrow,[9] or are incongruous or inappropriate,[10] though not to the extent of giving him relief distinct from and independent of that specially prayed for,[11] or inconsistent with the latter.[12] The limitations thus made are obviously necessary, as other-

tors may have such other and further relief,' etc. They say that if the complainants could claim the relief they insist upon, under any general prayer, it could only be under one in the disjunctive. Perhaps this would be true if the kinds or character of the relief claimed under the two prayers were essentially different and inconsistent, and the facts set forth in the bill did not sustain the special prayer." A personal judgment cannot be allowed under the general prayer for "such other and further relief as equity may require." Rees v. Shepherdson (Iowa) 64 N. W. 286.

[9] See Hill v. Beach, 12 N. J. Eq. 31. Where the statements of facts in the bill are broad enough to give the complainant a right to relief, it matters not how narrow the prayer may be, if the bill contains a prayer for general relief. Id.

[10] Annin v. Annin, 24 N. J. Eq. 184. See, also, Hall v. Pierce, 4 W. Va. 107; Shelby v. Tardy, 84 Ala. 327, 4 South. 276.

[11] Pickens v. Knisely, 29 W. Va. 1, 11 S. E. 932. Relief may be granted under the general prayer different from that specially prayed for, when it is consistent with the facts alleged and proved, if it does not take the defendant by surprise. Allum v. Stockbridge, 8 Baxt. (Tenn.) 356. Where a bill contains a prayer for specific relief, and also a prayer for general relief, other specific relief may be granted, not inconsistent with the case stated in the bill; but no relief can be granted, under the general prayer, entirely distinct from and independent of the specific relief prayed for. Thomason v. Smithson, 7 Port. (Ala.) 144; Pleasants v. Glasscock, Smedes & M. Ch. (Miss.) 17. A court of equity cannot act upon a case which is not fairly made by the bill and answer; but it is not necessary that these should point out in detail the means which the court should adopt in giving relief, under the general prayer for relief, beyond the specific prayer, and not exactly in accordance with it. Walden v. Bodley, 14 Pet. 156. Under 2 Rev. St. Ind. 1852, p. 220, § 380, and in the absence of an answer, the relief granted cannot exceed the relief demanded. Colson v. Smith, 9 Ind. 8. The prayer of relief in a complaint is not conclusive as to the relief to which plaintiff is entitled, but the court may give such relief as he is entitled to on the facts stated. Bergmann v. Salmon, 79 Hun, 456, 29 N. Y. Supp. 968.

[12] Busby v. Littlefield, 31 N. H. 193; Stone v. Anderson, 26 N. H. 506; Vance

wise the complainant could, by his special prayer, mislead his opponent, and then, under the general prayer, obtain relief which the latter might have prevented. A court of equity will not permit a bill framed for one purpose to answer another, to the surprise or prejudice of a defendant;[18] nor can special relief prayed for, and not objected

Shoe Co. v. Haught (W. Va.) 23 S. E. 553; Franklin v. Osgood, 14 Johns. (N. Y.) 527; Rennie v. Crombie, 12 N. J. Eq. 457; Simmons v. Williams, 27 Ala. 507; Florence Sewing-Mach. Co. v. Zeigler, 58 Ala. 221; Crain v. Barnes, 1 Md. Ch. 156; Tarbell v. Durant, 61 Vt. 519, 17 Atl. 44; and cases cited supra, note 7. "Under the general prayer for relief, the complainants may pray at the bar for such specific relief as the statements of the bill will warrant, provided it does not conflict with that specifically prayed for. 1 Daniell, Ch. Pl. & Prac. 434, 435, and notes; Story, Eq. Pl. § 41; Coop. Eq. Pl. 13, 14. In Bailey v. Burton, 8 Wend. 339, the rule was carried further, and it was there held that, under the general prayer, the complainant is entitled to any relief consistent with the case made, though inconsistent with the specific relief prayed for; and that under the prayer for general relief it was competent for a court of equity to set aside a mortgage as fraudulent, the facts warranting such conclusion, although the specific relief prayed for was permission to redeem. But this question can be settled when it shall be necessary so to do." Stone v. Anderson, 26 N. H. 506, 522. See Shields v. Trammell, 19 Ark. 62. Under a general prayer for relief, no relief can be given, except in case of an infant plaintiff, inconsistent with specific relief prayed. Kornegay v. Carroway, 2 Dev. Eq. (N. C.) 403. See, also, Stapilton v. Stapilton, 1 Atk. 6. Charities constitute another exception to the rule. Attorney General v. Jeanes, 1 Atk. 355.

[18] Coop. Eq. Pl. 14; Legal v. Miller, 2 Ves. Sr. 299; Lord Walpole v. Lord Orford, 3 Ves. 402, 416. See, also, Grimes v. French, 2 Atk. 141; Hiern v. Mill, 13 Ves. 114, 118; Allen v. Car Co., 139 U. S. 662, 11 Sup. Ct. 682; Rigg v. Hancock, 36 N. J. Eq. 42; Scott v. Gamble, 9 N. J. Eq. 218; Chalmers v. Chambers, 6 Har. & J. (Md.) 29; Peek v. Wright, 65 Ga. 638; Matthias v. Warrington, 89 Va. 533, 16 S. E. 662; Peck v. Peck, 9 Yerg. (Tenn.) 301; James v. Kennedy, 10 Heisk. (Tenn.) 607. "In order to entitle a plaintiff to a decree under the general prayer different from that specifically prayed, the allegations relied upon must not only be such as to afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed; otherwise the court would take the defendant by surprise, which is contrary to its principles." 1 Daniell, Ch. Pl. & Prac. 381. Quoted in Curry v. Lloyd, 22 Fed. 258, 264. Where the actual facts are correctly stated in a bill and proved, it is the duty of the court to render such decree and grant such relief as the law requires from such facts, without regard to the theory of the pleader in framing the bill. Allen v. Woodruff, 96 Ill. 11. See, also, Holden v. Holden, 24 Ill. App. 106; Adams v. Milling Co., 36 Fed. 212. Although a complainant may claim a relief not at all warranted

to, be abandoned in favor of a different decree under the general prayer;[14] though it seems that, if the bill shows a case for relief different from that specially prayed for, the complainant should be allowed to amend, and thus obtain what he is entitled to,[15] but the amendment can only be allowed under these circumstances,—not to make a different case.[16]

In case the complainant is in doubt as to which of two kinds of relief he is really entitled to, he may frame his prayer in the alternative, thus making what is called a bill with a double aspect, which will be considered hereafter under another head;[17] but such a prayer must be

by the facts, or may be entitled to a relief upon very different principles of equity from what he supposed, such a misapprehension of his case cannot defeat his right to relief. Hill v. Beach, 12 N. J. Eq. 31. Where a bill is filed to set aside a conveyance on the ground of undue influence, if the facts alleged in the bill are sufficient to justify the inference of undue influence, and the proofs sustain the allegations, relief will not be denied because the plaintiff, in stating his case, has averred that the transaction of which he complains occurred through mistake or misapprehension or by fraud and deceit. Brice v. Brice, 5 Barb. (N. Y.) 533. A bill praying for an injunction against threatened trespass to land will not sustain a decree quieting title. Harms v. Jacobs, 158 Ill. 505, 41 N. E. 1071. Where a bill alleges the execution of a purchase-money mortgage, and prays for its foreclosure, the complainant cannot recover on the theory that he has a vendor's lien. Baker v. Updike, 155 Ill. 54, 39 N. E. 587.

[14] Allen v. Coffman, 1 Bibb (Ky.) 469; Pillow v. Pillow, 5 Yerg. (Tenn.) 420; Gibson v. McCormick, 10 Gill & J. (Md.) 65. And see Hayward v. Bank, 96 U. S. 611, 615. See, also, Treadwell v. Brown, 44 N. H. 551; Mayne v. Griswold, 3 Sandf. (N. Y.) 463; Hilleary v. Hurdle, 6 Gill. (Md.) 105; Hiern v. Mill, 13 Ves. Jr. 114. But see Bailey v. Burton, 8 Wend. (N. Y.) 339. "The utility of the general prayer, conjoined with the particular prayer, is that, if the latter cannot be decreed, then, and not till then, a resort may be had to the former." Allen v. Coffman 1 Bibb (Ky.) 469, 472. See, also, Pillow v. Pillow, 5 Yerg. (Tenn.) 420.

[15] See Pennock v. Ela, 41 N. H. 189.

[16] See Deniston v. Little, 2 Schoales & L. 11, note; Griggs v. Staplee, 2 De Gex & S. 572. Cf. Halsted v. Meeker, 18 N. J. Eq. 136.

[17] Post, c. 4. See Bennet v. Vade, 2 Atk. 324, 325; Colton v. Ross, 2 Paige (N. Y.) 396; McConnell v. McConnell, 11 Vt. 290; Strange v. Watson, 11 Ala. 324; Stein v. Robertson, 30 Ala. 286. A bill may be drawn with a double aspect, so that, if one ground fail, the orator may rely upon another, which may be inconsistent with the former. McConnell v. McConnell, 11 Vt. 290. The proper case for a bill praying relief in the alternative is where the plain-

founded on claims that are consistent with each other, and the alternative case stated must be the foundation for precisely the same relief.[18]

If the bill prays relief to which the complainant is not entitled, the bill will be open to demurrer,[19] though a court of equity is always liberal in granting leave to amend under proper circumstances; and it seems, also, from the tendency of modern decisions, that a general prayer should be sufficient for all relief which the facts of the case warrant, except in case of special writs or orders pending the suit, as to which a respondent could have no information, and would therefore be unprepared to oppose unless specially asked for in the first in-

tiff is in doubt as to the kind of relief to which the facts stated in his bill entitle him, or the nature of the relief depends upon a particular fact or circumstance known to the defendant, and of which a discovery is sought by the bill. Lloyd v. Brewster, 4 Paige (N. Y.) 537; Strange v. Watson, 11 Ala. 324. Where the case made by the bill may entitle the plaintiff to one of two kinds of relief sought, but not to both, the prayer should be in the alternative. Colton v. Ross, 2 Paige (N. Y.) 396. There is no objection to a case being presented in the alternative, provided both alternatives be cognizable by the court, and are not so framed to elude a rule of court. Lingan v. Henderson, 1 Bland (Md.) 236. A disjunctive allegation, only one alternative of which is ground for relief, is bad. Lucas v. Oliver, 34 Ala. 626.

[18] Brown v. Improvement Co., 91 Va. 31, 20 S. E. 968. See Wright v. Wilkin, 4 De Gex & J. 141; Micou v. Ashurst, 55 Ala. 607, 612; Lloyd v. Brewster, 4 Paige (N. Y.) 537; Wilkinson v. Dobbie, 12 Blatchf. 298, Fed. Cas. No. 17,670; Collins v. Knight, 3 Tenn. Ch. 183; Terry v. Rosell, 32 Ark. 478, 492. Where a bill is framed with a double aspect, the relief sought must, in either alternative, be consistent with the case made by the bill. Colton v. Ross, 2 Paige (N. Y.) 396. A bill with a double aspect must be consistent with itself. It should not set up different and distinct causes of complaint that destroy each other. Hart v. McKeen, Walker (Mich.) 417. A bill is not repugnant where, under each phase of it, the complainant is entitled to precisely the same relief. McRae v. Singleton, 35 Ala. 297. One cannot, in a bill, pray for the execution of a trust, and, in the alternative, a partition, if the facts proved do not warrant the relief first prayed. He must assume that the facts are one way, and ask the appropriate relief. Pensenneau v. Pensenneau, 22 Mo. 27. It is not necessarily any evidence of fraud that a complainant in his bill puts his case upon different and inconsistent grounds. The bill in such case will not be dismissed on a general demurrer on the ground of fraud. Murrell v. Jones, 40 Miss. 565.

[19] Jordan v. Clark, 16 N. J. Eq. 243.

stance,[20] though there are cases in which an injunction may be granted without the formal request.[21]

Offers and Waivers.

It is usual to insert in this part of the bill any waiver or offer which the complainant chooses or may be compelled by the nature of his case to make as a condition precedent to obtaining relief, though there is no reason why this should not be done in the stating part of the bill.[22]

It is a principle of equity that a person seeking relief must himself do what is equitable. It is therefore required, in some cases, that a complainant should by his bill offer to do whatever the court may consider necessary to be done on his part towards making the decree which he seeks just and equitable with regard to the other parties to the suit.[23] Upon this principle, where a bill is filed to compel specific per-

[20] This is the reason given for requiring a special prayer where an injunction is sought. See Savory v. Dyer, Amb. 70; Walker v. Devereaux, 4 Paige (N. Y.) 229, 248; Lewiston Falls Manuf'g Co. v. Franklin Co., 54 Me. 402. See, however, Lewis v. Shainwald, 7 Sawy. 403, 48 Fed. 492; Shainwald v. Lewis, 46 Fed. 839; Dunham v. Jackson, 1 Paige (N. Y.) 629. In Lewis v. Shainwald, supra, Judge Sawyer held that the twenty-first equity rule, as to writs of ne exeat, applied only where the writ was asked pending the suit.

[21] Blomfield v. Eyre, 8 Beav. 250; and see Jacob v. Hall, 12 Ves. 458; Wood v. Beadell, 3 Sim. 273.

[22] 1 Daniell, Ch. Pl. & Prac. 387. The waiver of an answer under oath is usually inserted in the prayer for process. Fost. Fed. Prac. (2d Ed.) § 84.

[23] Daniell, Ch. Pl. & Prac. 385; Tucker v. Holley, 20 Ala. 426; Oliver v. Palmer, 11 Gill & J. (Md.) 426, 446; Deans v. Robertson, 64 Miss. 195, 1 South. 159; Gage v. Pumpelly, 115 U. S. 454, 6 Sup. Ct. 136; Connors v. City of Detroit, 41 Mich. 128, 1 N. W. 902. The rule applies to the government. U. S. v. White, 17 Fed. 561, 565. Where a party seeks the aid of a court of equity for relief against a forfeiture, and the forfeiture grows out of the nonpayment of money within a time fixed, he must show that he has since tendered payment of the amount with interest; and, if the tender was not accepted, he must aver in his petition that he is now ready and willing to pay the money. Beecher v. Beecher, 43 Conn. 556. A bill in equity to relieve from forfeiture for nonpayment of rent should allege a tender of the rent admitted to be due. Sheets v. Selden, 7 Wall. 416. A bill in equity which relies on a tender must set out such facts as constitute a tender in law. Cothran v. Scanlan, 34 Ga. 557. A complainant must allege in his bill that he has done, or offered to do, or is ready to do, everything necessary to entitle him to the relief he seeks, or sufficient excuse for its nonperformance. Oliver v. Palmer, 11 Gill & J. (Md.) 426. In a bill which seeks the rescission of a contract on the ground of fraud, an

formance of a contract by the defendant, the complainant ought by his bill to submit to perform the contract on his part.[24] So where a bill seeks to have an instrument or security, void under the usury laws, de-

offer in the bill to credit the defendant, on settlement before the court of the matters embraced in the contract, with the amount received by the complainant under the contract, or "to perform and abide by the order of the court in the premises," is a sufficient offer to do equity. Martin v. Martin, 35 Ala. 560. In Eureka Co. v. Edwards, 71 Ala. 248, 257, the court said: "The bill in the present case avers, and the proof sustains it, that the money received by Joseph C. and Ann Judson in the sale to Edwards had been consumed and disposed of by them while they were minors. This relieved complainant of the duty of tendering, or offering to pay. If it did not, then the offer in the present bill would be insufficient. The offer is 'to do equity, and to abide by and perform such things as, under equity and good conscience, may seem meet to entitle it to a decree for the cancellation of said deed.' The offer should have been to refund the money, with interest." See, also, Hartley v. Matthews, 96 Ala. 224, 11 South. 452. A party who desires to rescind a contract on the ground of fraud must offer to return the thing purchased, whether it be land or personal property. Murphy v. McVicker, 4 McLean, 252, Fed. Cas. No. 9,951. While a bill in equity to set aside a deed alleged to have been procured by fraud, that avers that no consideration was paid, will be sufficient, an averment or admission that a consideration was paid will render an averment of an offer to return such consideration necessary. Des Moines & M. R. Co. v. Alley, 16 Fed. 732. As to necessity of offer of indemnity in suit on lost instrument, see Exchange Bank v. Morrall, 16 W. Va. 546; East India Co. v. Boddam, 9 Ves. 464; Mossop v. Eadon, 16 Ves. 430. In equity, the court may require a plaintiff to do equity, as a condition upon which it will grant relief, and a failure to show, in the complaint to rescind a contract, that the plaintiff has offered to do equity before suit brought, if the complainant offer to submit to the order of the court in that respect, does not necessarily render it bad on demurrer. Shuee v. Shuee, 100 Ind. 477. See, also, American Wine Co. v. Brasher, 13 Fed. 595; Des Moines, etc., R. Co. v. Alley, 16 Fed. 732; Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21; Hartley v. Matthews, 96 Ala. 224, 11 South. 452. A bill in equity must state a case upon which, if admitted by the answer, a decree can be made; therefore a bill to redeem, from a sale upon execution, of a right of redemption, which contains no averment of readiness to pay, and an offer to pay, is bad on demurrer, for want of equity. Perry v. Carr, 41 N. H. 371. In Thomas v. Beals, 154 Mass. 51, 54, 27 N. E. 1004, the court said: "There was no necessity for an offer to return the consideration before the bill was

[24] 1 Daniell, Ch. Pl. & Prac. 385; Wilson v. Lineberger, 92 N. C. 547; Bell v. Thompson, 34 Ala. 633; McKleroy v. Tulane, Id. 78; Chess' Appeal, 4 Pa. St. 32; Bates v. Wheeler, 2 Ill. 54; Doyle v. Teas, 5 Ill. 202. In a suit by a vendor to compel specific performance of a contract to purchase land, a deed need not be tendered. Tavenner v. Barrett, 21 W. Va. 656.

livered up and canceled, equity will interfere only upon the condition that the complainant pay to the defendant what is bona fide due to

brought. A bill in equity is not, like an action at law, brought on the footing of a rescission previously completed; for instance, to replevy a horse which was obtained by a fraudulent exchange, and to which the plaintiff has no right, unless he has restored what he has received. Thayer v. Turner, 8 Metc. (Mass.) 550. The foundation of this bill is that the rescission is not complete, and it asks the aid of this court to make it so. It is objected that, at least, the bill ought to offer restitution. We are aware that in many cases an offer to do equity has been held necessary. But in the case at bar the court has power to impose equitable conditions upon the relief granted the plaintiffs; and it is hardly, if at all, conceivable that this decree in any event could be for the relief of the defendant alone against the plaintiffs, as in the case of an account, where nevertheless an offer is no longer necessary. Goldthwait v. Day, 149 Mass. 185, 21 N. E. 359. The plaintiffs, by seeking to set aside the conveyance, have elected to adopt all the consequences of rescission. Whether, in view of these considerations, any offer is necessary in the bill, we need not decide. The plaintiffs certainly have a right to try the question whether they ought to pay anything, and it is enough for them to offer, as they do, to repay the price, if the court finds it to be due." An offer to pay the amount due is not indispensable in a bill to redeem. Quin v. Brittain, Hoff. Ch. (N. Y.) 353; Barton Beach v. Cooke, 28 N. Y. 508. Where the bill is sustained, the decree should provide that in default of payment of amount due in a specified time the premises be sold. Grover v. Fox, 36 Mich. 462; Fosdick v. Van Husan, 21 Mich. 567. But see Waller v. Harris, 7 Paige (N. Y.) 168. "An offer to redeem is not an indispensable requisite, and its omission will not necessarily disarm the court or undermine the remedy. At most, it will, in general, affect the question of costs only, and these the court will be inclined to inflict where it appears likely that an offer and readiness to redeem upon grounds found to be reasonable would have been followed by the submission of defendant." Sandford v. Flint, 24 Mich. 26, 32. In a bill for an accounting, the plaintiff need not offer to pay any balance that may be found due from him. Such offer is implied. Hudson v. Barrett, 1 Pars. Eq. Cas. (Pa.) 414; Goldthwait v. Day, 149 Mass. 185, 21 N. E. 359; Craig v. Chandler, 6 Colo. 543; Hyre v. Lambert, 37 W. Va. 26, 28, 16 S. E. 446. Where the bill is filed by one who has purchased at a judicial sale in proceedings against the purchaser, and who has no notice of the original contract, the contract not being recorded, he is not bound before filing his bill to make a formal tender of the precise sum due; it is enough to offer to perform. Fitzhugh v. Smith, 62 Ill. 486. Where the circumstances are such that it is technically necessary that the bill contain an offer to perform, the absence of the offer is ground for demurrer. De Wolf v. Pratt, 42 Ill. 198. An offer in the bill to pay, do, or perform whatever may be requisite to entitle the plaintiff to the relief sought is merely matter of form. Such an offer is a necessary implication from the very act of coming

him, and where the complainant does not offer to do so by his bill a demurrer will be allowed.[25]

It is a rule in equity that no person can be compelled to make a discovery which may expose him to a penalty or to anything in the nature of a forfeiture.[26] As, however, the complainant is, in many cases, himself the only person who would benefit by the penalty or forfeiture, he may, if he pleases to waive that benefit, have the discovery he seeks.[27] The effect of the waiver, in such cases, is to entitle the defendant (in case the plaintiff should proceed, upon the discovery which he has elicited by his bill, to enforce the penalty or forfeiture) to apply for an injunction, which he could not do without such an express waiver.[28] It is usual to insert this waiver in the prayer of the bill, and if it is omitted the bill will be liable to demurrer.[29]

140. THE PRAYER FOR PROCESS—The ninth formal part of a bill is the prayer for process. It consists of a request that the process of the court shall issue to compel the defendant to appear and answer the bill and abide the decree of the court.

into court. Id. In a bill to set aside a tax title fraudulently obtained by defendant, it is not necessary to offer to refund the money paid by defendant therefor. Taylor v. Snyder, Walk. (Mich.) 490. See, also, Hanscom v. Hinman, 30 Mich. 419.

[25] Tupper v. Powell, 1 Johns. Ch. (N. Y.) 439; Campbell v. Morrison, 7 Paige (N. Y.) 158; Judd v. Seaver, 8 Paige (N. Y.) 548; Rogers v. Rathbun, 1 Johns. Ch. (N. Y.) 367; Fanning v. Dunham, 5 Johns. Ch. (N. Y.) 122; Giveans v. McMurtry, 16 N. J. Eq. 468; Ware v. Thompson's Adm'rs, 13 N. J. Eq. 66; Miller v. Bates, 35 Ala. 586; Matthews v. Warner, 6 Fed. 461; American Freehold Land & Mortg. Co. v. Jefferson, 69 Miss. 770, 12 South. 464. But see Long v. McGregor, 65 Miss. 70, 3 South. 240. An offer in the following form is sufficient: "The complainant hereby offers to pay the real advance and lawful interest." Miller v. Bates, 35 Ala. 586; Branch Bank at Mobile v. Strother, 15 Ala. 60.

[26] See post, p. 401.

[27] See Daniell, Ch. Pl. & Prac. 387; Mason v. Lake, 2 Brown, Parl. Cas. (Toml. Ed.) 495, 497; Attorney General v. Vincent, Bunb. 192; Evans v. Davis, 10 Ch. Div. 747.

[28] Daniell, Ch. Pl. & Prac. 387.

[29] Daniell, Ch. Pl. & Prac. 387. See 1 Fost. Fed. Prac. § 84; Attorney General v. Vincent, Bunb. 192.

141. Only those persons against whom process is prayed are considered parties, and where a person is sued as an individual and also in a representative capacity process must be prayed against him in both capacities.

142. The ordinary process prayed is the writ of subpœna.

143. A bill without a prayer for process is demurrable.

The prayer of the complainant that the process of the court, which is generally the writ of subpœna,[1] may issue to compel the appearance and answer of the defendant, is the last of the regular formal parts of the bill before enumerated.[2] In deference to the general rule that no persons are parties against whom process is not prayed, though named in the bill,[3] the prayer must either describe them by name or identify

§§ 140–143. [1] A writ of distringas has been sometimes included, to compel a corporation respondent to appear and answer by seizure of its property, after failure to respond to the subpœna, but this seems unnecessary. See Story, Eq. Pl. (10th Ed.) § 44, and note 3. And in the federal courts writs of injunction and ne exeat need only be asked in the prayer for relief (Eq. Rule 21); though the general equity rule is that the request shall be also made in the prayer for process (Story, Eq. Pl. [10th Ed.] § 44; Haddock v. Thomlinson, 2 Sim. & S. 219; Sharp v. Taylor, 11 Sim. 50; President, etc., of Union Bank of Maryland v. Kerr, 2 Md. Ch. 460). But see Collinson v. ————, 18 Ves. 353; Moore v. Hudson, 6 Madd. 219. The prayer for injunction should be inserted in the prayer for process as well as in the prayer for relief. Wood v. Beadell, 3 Sim. 273; Willett v. Woodhams, 1 Ill. App. 411. See Wilmington Star Min. Co. v. Allen, 95 Ill. 288, 297; Lewiston Falls Manuf'g Co. v. Franklin Co., 54 Me. 402.

[2] Ante, p. 174. Although an equitable petition may mention the name of a corporation, and contain a prayer for certain relief against it, such corporation is not a party to the petition, when there is no prayer for process as to it. J. K. Orr Shoe Co. v. Kimbrough (Ga.) 25 S. E. 204.

[3] Story, Eq. Pl. (10th Ed.) § 44; Coop. Eq. Pl. 16; Fawkes v. Pratt, 1 P. Wms. 593; Brasher v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 245; Talmage v. Pell, 9 Paige (N. Y.) 410; Hoyle v. Moore, 4 Ired. Eq. (N. C.) 175; Eq. Rule 23. Persons as to whom there is no allegation in a bill do not become parties merely because process is prayed and issued against them (Chapman v. Railroad Co., 18 W. Va. 184); nor, if designated in the bill, until the process is issued and served (Bond v. Hendricks, 1 A. K. Marsh. [Ky.] 594). See, also, Huston v. McClarty, 3 Litt. (Ky.) 274; Verplanck v. Insurance Co., 2 Paige (N. Y.) 438.

them as the same persons who are elsewhere described in the bill as defendants,[4] and this description or identification must include the particular character in which they are sued, as, under the above rule, they will be treated as parties only in the character in which process is prayed against them.[5] In the federal courts, under equity rule 23, a prayer for process will be defective which does not contain the names of all those named as defendants in the introductory part of the bill, as well as the fact of infancy or other disability resting upon any of them;[6] but, aside from the equity rule, if the bill clearly and

[4] All persons intended to be made defendants to a bill must be named therein, and process prayed against them; and if none are named, and there is a prayer for subpœnas to issue to the proper defendants, the bill will be dismissed, although certain persons appear and answer. Hoyle v. Moore, 4 Ired. Eq. (N. C.) 175. It seems to be sufficient, except in the federal courts, to pray process against "the said respondents," when they are clearly described in the bill as such. See Howe v. Robins, 36 N. J. Eq. 19; Elmendorf v. Delancey, 1 Hopk. Ch. (N. Y.) 555. In a bill to foreclose a mortgage, a prayer for relief and discovery against "said defendants hereinafter named" can only refer to defendants already mentioned, and not to a defendant mentioned merely in the following prayer for process. Wheeler & W. Manuf'g Co. v. Filer, 52 N. J. Eq. 164, 28 Atl. 13. A prayer in a bill that "the branch of the Bank of the State of Alabama at Mobile" be made a party to the bill, by serving a copy of the same on J. B. N., the "president thereof," though informal, is sufficient to evince the intention to make the bank a party; but the subpœna must, in such case, issue to the bank, and if issued to the president, commanding him to appear, etc., a judgment pro confesso cannot be taken against the bank, for want of an answer. Walker v. Hallett, 1 Ala. 379. In a suit against a corporation by their corporate name, prayer of process against the officers only, and an injunction granted in pursuance of the prayer, are irregular; and, the objection appearing on the face of the bill, no plea is necessary to bring it to the notice of the court. Verplanck v. Insurance Co., 1 Edw. Ch. (N. Y.) 46. The chancery rule requiring the prayer for process to specify the parties does not make a bill fatally defective for the want of it, if they are otherwise identified. Sheridan v. Cameron, 65 Mich. 680, 32 N. W. 894.

[5] Carter v. Ingraham, 43 Ala. 78. Cf. Ransom's Ex'rs v. Geer, 30 N. J. Eq. 250. A bill against a person in his individual capacity to enjoin proceedings at law instituted by him in a representative capacity is defective, but amendable. Pardridge v. Brennan, 64 Mich. 575, 31 N. W. 524. Where process is not prayed against a defendant in his representative character, he cannot be regarded as sued in that character. Pardridge v. Brennan, 64 Mich. 575, 31 N. W. 524.

[6] Failure to comply with the rule is ground for dismissal, but the defect may be cured by amendment. City of Carlsbad v. Tibbetts, 51 Fed. 852. See

consistently refers to and describes certain persons as defendants, and also shows the character in which each is sued, whether individual or representative, it seems sufficient if the prayer clearly identifies those against whom process is prayed as the same persons, without naming them,[7] and that such identification will also be sufficient as to the character in which they appear without formally describing it.[8] If a person is sued both personally and in a representative capacity, process should be prayed against him in both capacities;[9] and a corporation not named in the bill as a party respondent is not made so simply by praying process against its officers.[10] The method of framing the prayer depends largely, as in the case of interrogatories, upon rules of court or statutes, and these should be consulted in the particular case.[11]

It has been held that the omission of the prayer for process will render the bill demurrable,[12] or at least open to a special demurrer;

Goebel v. Supply Co., 55 Fed. 825. The defect is also cured by a general appearance. Buerk v. Imhaeuser, 8 Fed. 457. A similar rule exists in Florida (Ch. Rule 23). Noncompliance with the rule is ground for demurrer. Keen v. Jordan, 13 Fla. 327. See, also, McCoy v. Boley, 21 Fla. 803.

[7] See Sheridan v. Cameron, 65 Mich. 680, 32 N. W. 894. Cf. Anderson v. Wilson, 100 Ind. 402; Howe v. Robins, 36 N. J. Eq. 19; Alley v. Quinter, 4 MacArthur (D. C.) 390. See, also, Ferguson v. Hass, Phil. Eq. (N. C.) 113; De Wolf v. Mallett, 3 Dana (Ky.) 214; Elmendorf v. Delancey, Hopk. Ch. (N. Y.) 555; McKenzie v. Baldridge, 49 Ala. 564; Cook v. Dorsey, 38 W. Va. 197, 18 S. E. 468.

[8] See Ransom's Ex'rs v. Geer, 30 N. J. Eq. 249; Plaut v. Plaut, 44 N. J. Eq. 18, 13 Atl. 849; White v. Davis, 48 N. J. Eq. 22, 21 Atl. 187; Evans v. Evans, 23 N. J. Eq. 71.

[9] Carter v. Ingraham, 43 Ala. 78.

[10] Verplanck v. Insurance Co., 2 Paige (N. Y.) 438. See, also, Walker v. Hallett, 1 Ala. 379, cited ante, note 4.

[11] In New Hampshire the prayer for process is unnecessary, except where a special writ or process is desired (Ch. Rule 3, 38 N. H. 605); but in New Jersey its omission renders the bill defective (Wright v. Wright, 8 N. J. Eq. 145, 153).

[12] Wright v. Wright, 8 N. J. Eq. 143; Keen v. Jordan, 13 Fla. 327. See, also, McCoy v. Boley, 21 Fla. 803. An application to this court for relief in equity, which does not contain a prayer for process to be served on the defendant, or conclude with a general interrogatory, may be regarded as a bill, and, if properly amended, relief may be granted upon it. Belknap v. Stone, 1 Allen (Mass.) 572.

but if a defendant answers, and offers proof, he waives an objection that the bill did not pray process against him.[13]

If persons properly parties are out of the jurisdiction, it seems that the usual practice is to state that fact in the bill, and pray that process issue against them when they shall come within the jurisdiction.[14]

144. BILLS FOR FORECLOSURE OF MORTGAGES—A bill to foreclose a mortgage is, in general, one filed by the mortgagee, against the mortgagor, to enforce payment of the debt due the former from the latter, from the property given as security for such debt.

145. In some states its object is to bar or foreclose the mortgagor's interest or right of redemption in the property mortgaged, upon his failure to pay the amount due the complainant within a time fixed by the decree.

146. In others it contemplates a sale of the premises to satisfy the mortgage, and, in case of deficiency in the amount realized, a personal judgment against all persons liable; the right available to the mortgagor or to others entitled to redeem being only barred upon the expiration, without redemption, of a period allowed by law.

147. The bill must essentially contain:

(a) A statement showing the complainant's title or interest, and his right to sue, and the defendant's interest and liability, by a description of the mortgage and the note or evidence of debt thereby secured, their execution and delivery, the amount due

[13] Segee v. Thomas, 3 Blatchf. 11, Fed. Cas. No. 12,633; Buerk v. Imhaeuser, 8 Fed. 457; Majors v. McNeilly, 7 Heisk. (Tenn.) 294. But see Hoyle v. Moore, 4 Ired. Eq. (N. C.) 175.

[14] Eq. Rule 22. See, also, Windsor v. Windsor, 2 Dickens, 707; Milligan v. Milledge, 3 Cranch, 220; Lainhart v. Reilly, 3 Desaus. Eq. (S. C.) 590.

and owing to the complainant, and the default of the defendant in payment, and an accurate description of the property affected.

(b) A prayer for relief.

148. Where, as in most of the states, statutes prescribe the course of proceeding, such method must be strictly followed; and, in any case, all matters of description must be set forth accurately and with as great a degree of certainty as possible.

The foreclosure of mortgages by equitable suit is so largely regulated by statute at the present time that it is not easy to state rules of general application; what is known as strict foreclosure being still an available remedy in some states, while in others the proceeding contemplates a sale of the property covered by the mortgage, and the application of the proceeds towards the payment of the note or bond, and, in case of a deficiency in the amount realized, a personal judgment against all persons liable for the balance due.[1] It seems, however, that the principles upon which the theory of equity pleading is based, as to all matters of substance involved in the essential statement of the cause of action, may be still taken as governing the method of pleading, whether the proceeding be by bill, petition, or

§§ 144–148. [1] The English system of mortgages regarded the fact of the transfer as vesting the mortgagee with the legal title to the land, leaving only an equity of redemption of indefinite duration in the mortgagor, while what may be called here the "American system," since it is the one most generally recognized in this country, treats the mortgage as a security only, the legal title remaining in the mortgagor until divested by a sale. This distinction is the foundation of the different methods noticed in the text,—that of the strict foreclosure, in which an accounting is ordered and a decree entered requiring the mortgagor to redeem within a time limited or be forever barred of his right, without any sale whatever; and that which contemplates a sale of the premises in order to divest the mortgagor of his legal title, leaving him with a right of redemption during a period (generally a year from the sale) allowed by law. The strict foreclosure is still in common use in Connecticut and Vermont, and an available remedy in some other states, though in most it is obsolete. See Jones, Mortg. (3d Ed.) c. 34. In Maine, New Hampshire, Massachusetts, and Rhode Island the English method of foreclosure by writ of entry prevails. See Jones, Mortg. (3d Ed.) c. 28.

complaint, although the provisions of local statutes should always be consulted.[2]

The Statement.

The statement must in all cases show the complainant's title or interest and his right to sue, as well as the interest and liability of the respondent, by a full recital of the execution and delivery of the mortgage, and of the evidence of debt, whether note or bond, which it secures,[3] together with a full and accurate description of both,[4] and of the property covered by the mortgage,[5] and must state the default in payment by the respondent,[6] the amount claimed as due, and that it is due and owing to the complainant,[7] and that no proceedings, or, if any,

[2] See Jones, Mortg. (3d Ed.) § 145.

[3] Jones, Mortg. (3d Ed.) § 1452. See Moore v. Titman, 33 Ill. 358; Bull v. Meloney, 27 Conn. 560. An allegation in execution of the delivery of the mortgage is a sufficient allegation of its proper execution and of its validity. Moore v. Titman, supra; McAllister v. Plant, 54 Miss. 106; Shed v. Garfield, 5 Vt. 39. Possession of the mortgage raises a presumption of delivery. Long v. Kinkel, 36 N. J. Eq. 359; Commercial Bank of New Jersey v. Reckless, 5 N. J. Eq. 650. An averment that the mortgage was duly recorded is not essential, as against a defendant claiming an interest in the mortgaged premises who does not appear to be a subsequent purchaser. Mann v. State, 116 Ind. 383, 19 N. E. 181.

[4] As to description of debt, see Dewey v. Leonhardt, 37 Mo. App. 517; Bank of Key West v. Navarro, 22 Fla. 474; Merchants' Nat. Bank v. Raymond, 27 Wis. 567; Dorsch v. Rosenthall, 39 Ind. 209; Boyd v. Parker, 43 Md. 182; Brown v. Shearon, 17 Ind. 239; Aetna Life Ins. Co. v. Finch, 84 Ind. 301.

[5] Triplett v. Sayre, 3 Dana (Ky.) 590; Struble v. Neighbert, 41 Ind. 344; Whitelsey v. Beall, 5 Blackf. (Ind.) 143. See Hurt v. Freeman, 63 Ala. 335; Haaren v. Lyons, 56 Hun, 640, 9 N. Y. Supp. 211; Mercantile Trust Co. v. Kanawha & O. Ry. Co., 39 Fed. 337. A complaint containing no description of the mortgaged lands, but having a copy of the mortgage attached, containing such description, has been held sufficient. Whitby v. Rowell, 82 Cal. 635, 23 Pac. 40. See, also, Scott v. Sells, 88 Cal. 599, 26 Pac. 350. That an insufficient description will not prevent judgment on a note, when the suit is brought in both the note and mortgage, see Bayless v. Glenn, 72 Ind. 5.

[6] Coulter v. Bower, 64 How. Prac. (N. Y.) 132; Curtis v. Goodenow, 24 Mich. 18; Trustees of Canandaigua Academy v. McKechnie, 90 N. Y. 618; Triebert v. Burgess, 11 Md. 452. Only one of several defaults need be alleged. Beckwith v. Manufacturing Co., 14 Conn. 594. And inability to find the holder of the mortgage in order to make the payment is no defense, in the absence of fraud on the part of the former. Dwight v. Webster, 32 Barb. (N. Y.) 47.

[7] See Cornelius v. Halsey, 11 N. J. Eq. 27; Hagan v. Ryan, 27 N. J. Eq.

what proceedings, have been had at law for the recovery of the debt.[8] If the complainant is the original mortgagee, his title will sufficiently appear from the above,[9] but, if not, the means by which he became the owner of the security, whether by assignment or otherwise, must be clearly stated, as the facts of execution and delivery are always essential, and the present ownership must be clearly traced back, upon the record, to the original holder.[10] The description of the mortgage and evidence of debt, as well as of the property affected, must be accurate, especially the latter; [11] and the averments as to all other material facts should be sufficiently certain to show, in substance at least,

236. See, also, Taylor v. Hearn, 131 Ind. 537, 31 N. E. 201; Day v. Perkins, 2 Sandf. Ch. (N. Y.) 360. A bill for foreclosure, although it does not show the real consideration for, or the precise amount due upon, the mortgage, will authorize a decree, although the proofs may show a less sum to be due than was claimed, or a state of facts not averred in it, if these facts are not incompatible with the allegations of the bill. Collins v. Carlile, 13 Ill. 254. See, also, Day v. Perkins, 2 Sandf. Ch. (N. Y.) 359.

[8] McMullen v. Furnass, 1 Ind. 160; Pattison v. Powers, 4 Paige (N. Y.) 549.

[9] See Bull v. Meloney, 27 Conn. 560; Bethel v. Robinson, 4 Wash. 446, 30 Pac. 734; Commercial Bank of New Jersey v. Reckless, 5 N. J. Eq. 650. The title of the mortgagor is covered by the allegation of the execution of the mortgage, and the bill need not cover it. He is estopped by his deed. Shed v. Garfield, 5 Vt. 39; Racine & M. R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 331. As to alleging the title or interest of a party respondent, see Dexter, Horton & Co. v. Long, 2 Wash. St. 435, 27 Pac. 271; Union Ins. Co. v. Van Rensselaer, 4 Paige (N. Y.) 85; 2 Barb. Ch. Prac. 177. In a bill in chancery to foreclose a mortgage, claimed to have been executed by husband and wife upon land the fee of which was in the latter, the mortgage may be stated according to its legal effect, without stating in detail the various matters which are necessary to the transfer of a married woman's title. And quære, whether the simple averment that the husband and wife executed a mortgage to the complainant would not, after default and decree, have been sufficient. Williams v. Soutter, 55 Ill. 130. See, also, West v. Krebaum, 88 Ill. 263; Goltra v. Green, 98 Ill. 317.

[10] Jones, Mortg. (3d Ed.) § 1457. The record of the assignment need not be alleged. King v. Harrington, 2 Aikens (Vt.) 33, 35. See Fryer v. Rockefeller, 63 N. Y. 268; Bull v. Meloney, 27 Conn. 560. A bill by an assignee, alleging assignment of the mortgage, but not of the note or bond secured, is insufficient. Hays v. Lewis, 17 Wis. 210; Buckner v. Sessions, 27 Ark. 219; Cornelius v. Halsey, 11 N. J. Eq. 27; Babbitt v. Bowen, 32 Vt. 437; Ercanbrack v. Rich, 2 Chand. (Wis.) 100.

[11] Whittelsey v. Beall, 5 Blackf. (Ind.) 143. See Hurt v. Blount, 63 Ala. 327. Cf. Schmidt v. Mackey, 31 Tex. 659.

whatever is requisite. If local statutes regulate any part of the method of procedure, they should be strictly followed, and everything made necessary by statute should be alleged. An omission or discrepancy in the statement of the essential facts above mentioned will generally render the bill demurrable.

The Prayer.

The form of the prayer for relief will necessarily depend upon the particular object of the proceeding, as, for instance, whether it contemplates a strict foreclosure or a sale of the property and a personal judgment upon the note, but should, in accordance with the principles already stated, specially ask for all the relief desired,[12] following with the general prayer.

149. BILLS TO REDEEM—A bill to redeem is one filed by the person or persons holding an equity of redemption, or right to redeem, to enforce such right, and recover the property foreclosed upon.

150. It is an available remedy for all persons from whom the legal title has been divested by the foreclosure, or for assignees of the mortgagor's interest or equity, or for persons holding particular interests under him, not embracing the whole of such equity.

151. The bill must essentially contain:

(a) A statement showing the complainant's title or interest, and his right to redeem, and the defendant's interest and liability, including a description of the sale or foreclosure to be redeemed from, and alleging a tender of the amount due, and an offer to pay the same, and the neglect or refusal of the respondent to permit such payment.

(b) A prayer for relief.

152. The particular facts and circumstances showing the right to redeem must generally be set forth, in or-

[12] Jones, Mortg. (3d Ed.) §§ 1475–1478. See Bullwinker v. Ryker, 12 Abb. Prac. (N. Y.) 311; Simonson v. Blake, 20 How. Prac. (N. Y.) 484; Hansford v. Holdam, 14 Bush (Ky.) 210. And see Armstrong v. Ross, 20 N. J. Eq. 109.

der that the court may not only be assured of the existence of such right, but may also see that the same has not been lost by unreasonable delay.

Nearly as important as bills to foreclose mortgages are those brought to enforce the right or equity of redemption remaining in the mortgagor or his assigns, or available to creditors or others having particular interests derived through him, and not embracing his whole interest; and the principles applicable govern also in cases of redemption from judicial sales, or wherever the legal title to property has been divested, leaving a right to recovery upon payment of what is due.[1] Proceedings of this character, as in the case of foreclosure, are now chiefly regulated by statute in the different states.[2]

The Statement.

The facts to be stated as a cause of action in bills of this character must necessarily vary according to the circumstances of each case. Although generally regulated by statute, the recognized principles of equity call for a showing of the title or interest of the complainant in the property in question, as mortgagor, assignee, judgment creditor, owner of the property affected by the judicial or execution sale, or otherwise, with the circumstances from which the right to redeem arose,[3] and an allegation that the amount due was tendered and refused, with an offer to pay it, or at least the latter.[4]

§§ 149–152. [1] See 2 Jones, Mortg. (3d Ed.) § 1093.

[2] There is no common-law or equitable right of redemption after foreclosure sale, in the absence of any statutory provision on the subject. Parker v. Dacres, 130 U. S. 43, 9 Sup. Ct. 433. See Knox v. Armistead, 87 Ala. 511, 6 South. 311.

[3] 2 Jones, Mortg. (3d Ed.) 1094. See Pryor v. Hollinger, 88 Ala. 405, 6 South. 760; Johnson v. Golder, 132 N. Y. 116, 30 N. E. 376.

[4] Harding v. Pingey, 10 Jur. (N. S.) 872; Perry v. Carr, 41 N. H. 371; Silsbee v. Smith, 60 Barb. (N. Y.) 372; Crews v. Threadgill, 35 Ala. 334; Hoopes v. Bailey, 28 Miss. 328; Coombs v. Carr, 55 Ind. 303; Kemp v. Mitchell, 36 Ind. 249; Turner v. Williams, 63 Ga. 726. See, also, Beebe v. Buxton, 99 Ala. 117, 12 South. 567. But see Nye v. Swan, 49 Minn. 431, 52 N. W. 39. Poverty will not excuse failure to make tender. Goldsmith v. Osborne, 1 Edw. Ch. (N. Y.) 560. As to paying money into court, and its effect upon costs, see Daughdrill v. Sweeney, 41 Ala. 310; Hart v. Goldsmith, 1 Allen (Mass.) 145. See, also, Lamb v. Jeffrey, 41 Mich. 719, 3 N. W. 204; Essley v. Sloan, 16 Ill.

The statement of facts must be sufficiently explicit to show, not only the actual existence of such a right, but also that it has not been lost by unreasonable delay, or by passive acquiescence in the expiration of the period fixed by law.[5] If the statutory period has not commenced to run, through defects in the proceedings or for some other reason, the right to redeem may still be barred in equity by an unjustifiable or unexplained neglect to enforce it;[6] especially where, as is often the case, the rights of third persons have intervened. If the case is one where fraud or usury are relied on, the facts as to either ground must be set forth, general allegations not being sufficient;[7] and as one of the objects of the bill is to fix the amount necessary for redemption, an accounting for that purpose being generally prayed, the receipt of rents and profits by a mortgagee in possession, as well as any other facts which might tend to reduce or fix the amount in question, should also appear.[8] An examination of the statute of the particular state will be necessary in each case, the conditions governing redemption being now generally regulated by law.

The Prayer.

This should be specific, generally asking that an account be taken to ascertain what may be due, as well as for any other particular relief desired, and followed by the general prayer.[9] From the ac-

App. 63. An allegation of tender before filing of the bill is not essential to the equity of the bill. It is only material upon the question of costs. McGuire v. Van Pelt, 55 Ala. 344. See, also, Adams v. Sayre, 70 Ala. 318.

[5] Langley v. Jones, 43 N. J. Eq. 404, 4 Atl. 308.

[6] See Bergen v. Bennett, 1 Caines, Cas. (N. Y.) 1; Mulvey v. Gibbons, 87 Ill. 367; Danforth v. Roberts, 20 Me. 307.

[7] See Waterman v. Curtis, 26 Conn. 241.

[8] See Cree v. Lord, 25 Vt. 498; Barton v. May, 3 Sandf. Ch. (N. Y.) 450; Dennis v. Tomlinson, 49 Ark. 568, 6 S. W. 11; Quin v. Brittain, Hoff. Ch. (N. Y.) 353.

[9] See Seawright v. Parmer (Ala) 7 South. 201; Parmer's Adm'r v. Parmer, 88 Ala. 545, 7 South. 657. The fact that the court does not grant the right to relief precisely as alleged in the bill, will not defeat the right to a decree, under the general prayer. Bremer v. Dock Co., 127 Ill. 464, 18 N. E. 321. A bill alleging a certain deed to be a mortgage, and an agreement to reconvey and tendering the amount due, and asking for specific performance of the agreement, will be considered a bill to redeem. Adair v. Adair, 22 Or. 115, 29 Pac. 193.

cepted forms, it appears that in some cases the offer to pay the amount due is made in this part of the bill, though it seems to belong more properly to the statement of the cause of action. Either method will probably be sufficient.[10]

153. BILLS FOR PARTITION—A bill for the partition of real property is one filed by one of several persons holding undivided interests in a particular tract of land, against the holders of the remaining interests, to obtain the decree of the court setting off to each, in severalty, a specific part, proportionate in quantity and value to the interest of each in the whole.

154. The bill must essentially contain:

(a) A statement of facts showing the title and interest of both complainant and defendants, the property held in common, the extent and value of the interests of each party, and the value of the whole tract to be partitioned.

(b) A statement showing a legal injury to the complainant if relief is denied.

(c) A prayer for relief.

155. The title or interest of the defendants may be stated generally, but that of the complainant should be fully and positively set forth, and the property affected must be accurately described. Statutory requirements must in all cases be strictly followed.

Bills of the above class are frequent in equity procedure, and are available, at the present time, for all persons holding interests in real estate in common, though formerly redress in such cases was afforded by writ of partition at common law, and was limited to coparceners only.[1] The partition of real property is now almost

[10] See ante, p. 230.

§§ 153–155. [1] Fetter, Eq. 259. A tenant in common, whose title is clear, is entitled to partition as a matter of right. Willard v. Willard, 145 U. S. 116, 12 Sup. Ct. 818. The statutory regulations for partition of lands do not take away the original jurisdiction of chancery. Patton v. Wagner, 19 Ark. 233.

entirely regulated by statute, and the laws of each state should be consulted as to cases affecting land within their limits; but a bill will not generally lie unless the legal title to the land in question is clear and undisputed,[2] and where the complainant cannot show possession, either actual or constructive, his remedy is by an action of ejectment, at law.[3]

The Statement.

Whatever requisites may be prescribed or indicated by statute must, of course, be strictly followed in the statement of the cause of action;[4] but, under the equitable principles applicable, the es-

Cf. Rutherford v. Jones, 14 Ga. 521. Petitions for partition under the statute are proceedings at law, and not in equity. Wilbridge v. Case, 2 Ind. 36. Only a court of chancery can make partition of personal property. Crapster v. Griffith, 2 Bland (Md.) 5; Tinney v. Stebbins, 28 Barb. (N. Y.) 290.

[2] Bruton v. Rutland, 3 Humph. (Tenn.) 435; Stuart v. Coalter, 4 Rand. (Va.) 74; Albergottie v. Chaplin, 10 Rich. Eq. (S. C.) 428; Criscoe v. Hambrick, 47 Ark. 235, 1 S. W. 150; Carrigan v. Evans, 31 S. C. 262, 9 S. E. 852; Pierce v. Rollins, 83 Me. 172, 22 Atl. 110. But a court of equity will retain a bill filed for partition to enable the complainant to establish his title at law (Garrett v. White, 3 Ired. Eq. [N. C.] 131; McCall v. Carpenter, 18 How. 297; Horton v. Sledge, 29 Ala. 478; Hay v. Estell, 18 N. J. Eq. 251; Boone v. Boone, 3 Md. Ch. 497; Fenton v. Steere, 76 Mich. 405, 43 N. W. 437; Straughan v. Wright, 4 Rand. [Va.] 493); though not of its own motion (Hassam v. Day, 30 Miss. 392). See Nash v. Simpson, 78 Me. 143, 3 Atl. 53. And will entertain jurisdiction to settle disputed equitable titles, and grant relief by way of partition, under the same bill. Hayes' Appeal, 123 Pa. St. 110, 16 Atl. 600. See, also, Carter v. Taylor, 3 Head (Tenn.) 30; Lucas v. King, 10 N. J. Eq. 277; Hosford v. Merwin, 5 Barb. (N. Y.) 51; Gore v. Dickinson, 98 Ala. 363, 11 South. 743. One not alleged to be a tenant in common cannot be brought in to litigate an adverse assertion of title. Hillens v. Brinsfield (Ala.) 18 South. 604. The bill, in order to bring adverse or conflicting titles before the court, must state their nature, if known, and pray for a decree in reference to them. Gage v. Reid. 104 Ill. 509.

[3] Lambert v. Blumenthal, 26 Mo. 471; Jenkins v. Van Schaak, 3 Paige (N. Y.) 242; Brown v. Coal Co., 40 Fed. 849. See Haskell v. Queen, 66 Hun, 634, 21 N. Y. Supp. 357; In re Adelman's Estate, 6 Kulp (Pa.) 382. Where a bill for partition does not state that the complainant is seised or possessed of the land, and shows that the land is within a city, and has been subdivided into numerous lots, claimed by different persons, it will be construed, on demurrer, as showing that the complainant has been disseised. Sanders v. Devereux, 8 C. C. A. 629, 60 Fed. 311.

[4] See Prichard v. Littlejohn, 128 Ill. 123, 21 N. E. 10. Where partition is

sential facts to be shown will at least include the complainant's title to or interest in the land in question, as well as that of the defendants,[5] together with either actual or constructive possession

sought in equity, not by petition under the statute, the bill need not be verified by oath. Labadie v. Hewitt, 85 Ill. 341.

[5] Tibbs v. Allen, 27 Ill. 119. See Brown v. Brown, 133 Ind. 476, 32 N. E. 1128. The title or interest may be either legal or equitable (Luco v. De Toro, 91 Cal. 405, 27 Pac. 1082); though it must generally be more than that of a remainder-man during the continuance of a particular estate. See Culver v. Culver, 2 Root (Conn.) 278; Ziegler v. Grim, 6 Watts (Pa.) 106; Merritt v. Hughes, 36 W. Va. 356, 15 S. E. 56. That the interest of one of two complainants in an action for partition does not appear, that it does appear affirmatively that one of them has no interest, and that the necessity for a sale for division is stated as a conclusion of the pleader, are amendable defects, and hence insufficient to support the dismissal of the bill for want of equity. Sherer v. Garrison (Ala.) 19 South. 988. Petition for sale of lands for division among joint owners or tenants in common need not state the residence of the petitioners. Griel v. Randolph (Ala.) 18 South. 609. To obtain a partition of land by proceedings in equity, the complainant must allege and establish a seisin in himself. Warfield v. Gambrill, 1 Gill & J. (Md.) 503. A bill for partition, denying the title of the defendant, but alleging that his title, if any, is that of tenant in common, cannot be sustained. Ramsay v. Bell, 3 Ired. Eq. (N. C.) 209. A petition for partition of land, in which the petitioner avers himself to be tenant in common with "persons unknown," will not support a judgment for partition. Smith v. Pratt, 13 Ohio, 548. The demandant is bound to set forth the title and interest of the several tenants truly, and to sustain his petition by proof. Harman v. Kelley, 14 Ohio, 502; Millington v. Millington, 7 Mo. 446. The bill must set forth the interests of all the parties in the premises, the court being required by statute to ascertain and declare the rights of all parties. Prichard v. Littlejohn, 128 Ill. 123, 21 N. E. 10. In a suit for partition, the plaintiff must set forth the rights and interests of the parties, as well between themselves as against him, positively, if known to him; otherwise, according to his information and belief; and, if the rights are contingent, he must state the nature of the contingency. Van Cortlandt v. Beekman, 6 Paige (N. Y.) 492. Where a bill for partition does not distinctly state the interests of the respective parties, and it does not appear who has been served with process, a reference will be directed to ascertain those facts, though a sale is prayed by the bill. Wooten v. Pope, 2 Dev. & B. Eq. (N. C.) 306. In the petition for partition, it is not necessary to set forth the right and title of the several tenants at large, nor is it necessary to allege the seisin of the ancestor or person from whom the parties derive title; but it is sufficient to state, in general terms, that each tenant is seised of his part or share in fee, or, as the case may be, whether such seisin was acquired by descent or purchase. Bradshaw

by the former,[6] a description of the land which will clearly and completely identify it, a statement of the value of the land and of the relative proportions held by each person interested, and such other facts as will tend to show the necessity for the relief sought, or which will authorize a sale if an actual division is impracticable.[7] The title of the complainant must be clearly and accurately stated, but that of the defendants may be by a general allegation that they are the owners of, and seised in fee of, or otherwise well entitled to, the remaining undivided portions of the property to be divided;[8] and, while actual or constructive possession is necessary,

v. Callaghan, 8 Johns. (N. Y.) 435. Where, in an action for partition, all necessary parties are joined, any error in stating in the complaint their interests, or any omission to state what, on motion, the plaintiff might have been compelled to insert by way of amendment, is not an irregularity which can affect the title. Noble v. Cromwell, 26 Barb. (N. Y.) 475; Id., 6 Abb. Prac. (N. Y.) 59. The bill is sufficient in statement of title to support a decree, where it alleges seisin and death intestate of the ancestor of the parties, and that the complainants are his heirs, although it might prove obnoxious to a demurrer for want of more specific allegation. Schneider v. Seibert, 50 Ill. 284. A bill for partition may be amended, at the discretion of the court, so as to make one of the co-tenants a defendant instead of a complainant. McDuffee v. Sinnott, 119 Ill. 449, 10 N. E. 385.

[6] Bonner v. Proprietors of Kennebeck Purchase, 7 Mass. 475; Adam v. Iron Co., 24 Conn. 230; Brownell v. Brownell, 19 Wend. (N. Y.) 367; Stevens v. Enders, 13 N. J. Law, 271; Whitten v. Whitten, 36 N. H. 326. See Balen v. Jacquelin, 67 Hun, 311, 22 N. Y. Supp. 193; Hanner v. Silver, 2 Or. 336. A petition for partition described the land to be divided as "one-fourth of an acre of land, on which a sawmill formerly stood, on a stream of water called by the name of 'Fall Brook,' with the lands on which the logways of said mill were laid." Held, that description of land was insufficient, and that the defect was not cured by a reference to a deed of said land in the petition. Miller v. Miller, 16 Pick. (Mass.) 215.

[7] Ross v. Ramsey, 3 Head (Tenn.) 15. See Briges v. Sperry, 95 U. S. 401; Miller v. Miller, 16 Pick. (Mass.) 215. A complaint for a partition of land, which states that the premises cannot be divided by metes and bounds without prejudice, is good, although it does not state facts showing why such a partition cannot be made. De Uprey v. De Uprey, 27 Cal. 329. If a bill for a partition of several tracts of land shows a right in the complainant to have one of the tracts divided, a demurrer to the whole bill should be overruled. Carter v. Kerr, 8 Blackf. (Ind.) 373.

[8] Story, Eq. Pl. (10th Ed.) § 255; Baring v. Nash, 1 Ves. & B. 551.

the fact of such possession will generally be implied from the statement that the lands are held in common.[9]

As tenants in common are entitled to partition as a matter of right, there can strictly be no statement of an injury to the complainant as a foundation of his right to relief, unless in cases where an amicable division has been sought and refused, or where a continuance of the tenancy in common would work such injury. In such cases the facts should appear.

The Prayer.

As the court is generally authorized to decree a sale of the property in case that is desired or an actual division is impracticable or inadvisable, it seems that the prayer for relief should be in the alternative, for a partition, or, if that cannot be made, for a sale and a division of the proceeds, or for such other relief as local statutes may provide for.[10] Partition should always be asked, however, and general relief prayed for, as the court will not order an actual partition on a bill framed for and asking only for a sale.[11]

156. BILLS TO QUIET TITLE—A bill to quiet title is one filed by a person holding the legal title to land, against a person or persons holding or claiming adverse interests therein, to obtain a decree annulling such claims or interests as clouds upon his title, and quieting such title in him.

[9] See Jenkins v. Van Schaak, 3 Paige (N. Y.) 242; Thomas v. Garvan, 4 Dev. (N. C.) 223; Rozier v. Griffith, 31 Mo. 171; Bradshaw v. Callaghan, 8 Johns. (N. Y.) 435. A petition for partition of lands among tenants in common need not allege that the tenants are in possession of the land. Alexander v. Gibbon, 118 N. C. 796, 24 S. E. 748.

[10] See Dyer v. Vinton, 10 R. I. 517. A bill to have property partitioned, and, in the event of its being held to be not susceptible of partition, then to have it sold, and the proceeds divided after payment of a mortgage debt, is not multifarious. Claude v. Handy, 83 Md. 225, 34 Atl. 532. In order to authorize a sale for partition, the bill must be framed with that view, containing the proper averments, and the regular proceedings must be had under it. Ross v. Ramsey, 3 Head (Tenn.) 15. In an action for a partition, defendants not having answered cannot be required to account for rents, if the complaint did not specifically ask such relief. Bullwinker v. Ryker, 12 Abb. Prac. (N. Y.) 311.

[11] McKay v. McNeill, 6 Jones, Eq. (N. C.) 258.

157. The bill must essentially contain:

(a) A statement showing the title or interest of the complainant, and his possession or a right to immediate possession, and an accurate description of the property affected.

(b) A hostile adverse claim by the defendant, and its nature, with such facts as show an actual or threatened injury from its existence.

(c) A prayer for relief.

158. The title of the complainant should be stated with certainty, though by general allegations, and the land accurately described, but the hostile claim of the respondent may be generally stated.

159. Independent of statute, actual possession must be shown to sustain a suit based upon a legal title, but a right to immediate possession is sufficient where the title is merely equitable.

Equitable actions to quiet title are in common use at the present time, though now largely regulated by statute;[1] their object being to remove a cloud or defect which, upon its face, appears to be a valid adverse claim against the title in question,[2] upon the

§§ 156–159. [1] In all or nearly all of the states statutes have been enacted for quieting title or determining adverse claims to real estate, some of which permit the maintenance of the action by a person out of possession.

[2] See Benner v. Kendall, 21 Fla. 584; Rea v. Longstreet, 54 Ala. 291. A bill in equity which states no title or pretended title in defendant that would be apparently good at law without evidence aliunde cannot be maintained on the ground of removing a cloud upon the title. Torrent v. Booming Co., 22 Mich. 354. Where the bill is brought by the holder of a tax title, it must show affirmatively the proceedings, so that it can be seen whether the title is good or not. Koch v. Hubbard, 85 Ill. 533. And a bill to set aside a tax deed must allege the invalidity of the sale or the deed. Gage v. McLaughlin, 101 Ill. 155. Where the statute makes a tax deed prima facie evidence of title, an allegation in the complaint that the tax deed is regular on its face sufficiently shows its apparent validity. Day v. Schnider, 28 Or. 457, 43 Pac. 650. Naming in the complaint several reasons why the deed is invalid does not render the complaint demurrable as joining several causes of suit. Day v. Schnider, 28 Or. 457, 43 Pac. 650. In a suit to quiet title the complainant need not

principle that such claim, though not actively effective in causing a present injury, still stands as a menace to the title, and may result in vexatious litigation affecting it if allowed to remain, the lapse of time naturally tending to lessen or impair the evidence available.[3] Such actions are strictly bills of peace, and rest upon the same principle as bills quia timet, but generally relate only to land, and are so largely regulated by statute that the laws of the different states should be consulted in this connection.[4]

The Statement.

Under the different statutes governing actions of this character, the statement of the cause of action is generally a brief and formal one, whose requisites are indicated by the particular act; but in general the application of equitable principles requires a statement of the ownership of the complainant, as well as of his actual possession of the land,[5] or his right to immediate possession,[6] together

show by his bill that the defendant's claim is prima facie good law, nor, since he cannot be presumed to know it, need he set forth therein the ground upon which the defendant asserts its validity. Holbrook v. Winsor, 23 Mich. 394. An offer in the bill to pay whatever money, taxes, and interest equity may require is a sufficient offer to do equity. Sankey v. Seipp, 27 Ill. App. 299.

[3] Fetter, Eq. 317.

[4] As to what constitutes a cloud justifying a suit for its removal, see Sloan v. Sloan, 25 Fla. 53, 5 South. 603; Franklin Sav. Bank v. Taylor, 131 Ill. 376, 23 N. E. 397; Gage v. Kaufman, 133 U. S. 471, 10 Sup. Ct. 406; Culver v. Phelps, 130 Ill. 217, 22 N. E. 809; Mutual Life Ins. Co. v. Corey, 54 Hun, 493, 7 N. Y. Supp. 939; Bayha v. Taylor, 36 Mo. App. 427; Borst v. Simpson, 90 Ala. 373, 7 South. 814; Remer v. McKay, 54 Fed. 432.

[5] See Shapley v. Rangeley, 1 Woodb. & M. 213, Fed. Cas. No. 12,707; Moores v. Townshend, 102 N. Y. 387, 7 N. E. 401; U. S. v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991; Sloan v. Sloan, 25 Fla. 53, 5 South. 603; Gage v. Kaufman, 133 U. S. 471, 10 Sup. Ct. 406; Graves v. Ewart, 99 Mo. 13, 11 S. W. 971; Moses

[6] That actual possession is not essential where the title is merely equitable, see Sloan v. Sloan, 25 Fla. 53, 5 South. 603. This is the rule under the Indiana statute. See Stanley v. Holliday, 130 Ind. 464, 30 N. E. 634, where it was held that a complaint which alleges that plaintiff "is the owner by complete equitable title, and is entitled to the possession," is good on demurrer, without specifying the nature and extent of such title. See, also, Holden v. Holden, 24 Ill. App. 106. See post, note 10. If plaintiff is not entitled to possession, the complaint must show the nature of his interest or title, and that it is consistent with the right of possession in another. Pittsburg, C., C. & St. L. Ry. Co. v. O'Brien, 142 Ind. 218, 41 N. E. 528.

with that of an adverse claim by the defendant,[7] and a description of the property affected sufficiently accurate for purposes of identification.[8] In the absence of any statute dispensing with it, the fact of actual possession by the complainant is necessary to maintain a suit to remove a cloud from a title,[9] though it seems

v. Gatliff (Ky.) 12 S. W. 139. A bill alleging that plaintiff is the owner in fee and in possession is good under a statute requiring plaintiff to be "in peaceable possession claiming to own." Ludington v. City of Elizabeth, 32 N. J. Eq. 159. The bill must aver title in the complainant; averment that he had title two or three years before the filing of the bill is not enough. Parke v. Brown, 12 Ill. App. 291. The complainant, however, is not required to show a perfect title as against the world, as a party seeking possession is. Rucker v. Dooley, 49 Ill. 377. Cf. Gage v. Schmidt, 104 Ill. 106. Evidence of title by adverse possession is admissible under an allegation of ownership in fee. Rogers v. Miller, 13 Wash. 82, 42 Pac. 525. Where the source of plaintiff's title is specifically set out, no other source can be proven. Pittsburg, C., C. & St. L. Ry. Co. v. O'Brien, 142 Ind. 218, 41 N. E. 528. A bill failing to show any title in the complainant is fatally defective. Pierce v. Hunter, 73 Miss. 754, 19 South. 660. An allegation that plaintiffs are "owners in entirety" will be considered as an allegation of the statutory estate by entireties. Pittsburg, C., C. & St. L. Ry. Co. v. O'Brien, 142 Ind. 218, 41 N. E. 528. The bill must show: (1) Possession; (2) a legal or equitable title; (3) a claim set up by the defendant; (4) plaintiff's own claim must be substantiated,—he cannot rely upon the weakness of his adversary's title. Stockton v. Williams, 1 Doug. (Mich.) 546.

[7] See Gamble v. Loop, 14 Wis. 465; Campbell v. Disney, 93 Ky. 41, 18 S. W. 1027. As to the rule in New Jersey, see Southmayd v. Elizabeth, 29 N. J. Eq. 203. A petition to quiet title filed against L., "or his unknown heirs," is insufficient in not showing by whom the adverse claim was asserted. Lamb v. Boyd, 4 Ohio Cir. Ct. R. 499. An allegation in the complaint that "defendant claims some interest in the land adverse to plaintiff's, which is a cloud on plaintiff's title," is sufficient, even though the land in issue consists of several parcels. Tolleston Club of Chicago v. Clough (Ind. Sup.) 43 N. E. 647.

[8] See Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Butler v. Railroad Co., 85 Mich. 246, 48 N. W. 569. As to averment of notice of complainant's equities, see Osborne v. Prather, 83 Tex. 208, 18 S. W. 613. As an instance of a complaint held demurrable for insufficiency of statement, see Hershberger v. Blewett, 46 Fed. 704. Cf. Bellingham Bay Land Co. v. Dibble, 4 Wash. 764, 31 Pac. 30.

[9] U. S. v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991; Livingston v. Hall, 73 Md. 386, 21 Atl. 49. See Ashurst v. McKenzie, 92 Ala. 484, 9 South. 262; Graves v. Ewart, 99 Mo. 13, 11 S. W. 971; Sloan v. Sloan, 25 Fla. 53, 5 South. 603. One cannot file a bill to quiet his title to lands against a person in possession claiming adversely, and the legislature cannot confer such a right. The reme-

that this refers to a case where the title is a legal one, and not to one where it is merely equitable;[10] and it must also appear that

dy is by ejectment, in which the claimant is entitled to jury trial. Tabor v. Cook, 15 Mich. 322. How. Ann. St. § 6626, prior to its amendment by Act No. 260 of 1887, did not authorize a bill to quiet title to be maintained by one not in actual possession of the premises. Methodist Episcopal Church v. Clark, 41 Mich. 730, 3 N. W. 207; Page v. Montgomery, 46 Mich. 51, 8 N. W. 582; Kilgannon v. Jenkinson, 51 Mich. 240, 16 N. W. 390; Hatch v. Village of St. Joseph, 68 Mich. 220, 36 N. W. 36. One out of possession cannot file a bill to quiet title under a tax deed executed in 1883; How. Ann. St. § 1168, having been repealed, and the want of possession preventing such a bill independently of the statute. Goodman v. Nester, 64 Mich. 662, 31 N. W. 575. So a bill to quiet title to unoccupied wild lands not in the actual possession of either party could not be maintained prior to 1887. Jenkins v. Bacon, 30 Mich. 154. Since the statute of 1869, in order to give jurisdiction to remove a cloud upon title the bill must show that the complainant is in possession or that the premises were unimproved and unoccupied when the bill was filed. Gage v. Abbott, 99 Ill. 366. Followed by Oakley v. Hurlbut, 100 Ill. 204; Booth v. Wiley, 102 Ill. 84; Gage v. Griffin, 103 Ill. 41; Gage v. Parker, Id. 528; Gould v. Sternburg, 105 Ill. 488; Wetherell v. Eberle, 123 Ill. 666, 14 N. E. 675; Johnson v. Huling, 127 Ill. 14, 18 N. E. 786; Parke v. Brown, 12 Ill. App. 291; Holden v. Holden, 24 Ill. App. 106; Johnson v. McChesney, 33 Ill. App. 526. Cf. Gage v. Schmidt, 104 Ill. 106. This, where what the complainant seeks to remove is in the nature of a legal title, which is or may be asserted adversely to the title which he seeks to protect. Holden v. Holden, 24 Ill. App. 106. But otherwise where the legal title is not disputed, but the defendant sets up an equity which constitutes a cloud, which does not affect the legal right to possession, and which an action at law will not determine; the remedy at law is not adequate. Holden v. Holden, 24 Ill. App. 106. It must be shown that complainant was in possession of the land when the bill was filed, or that the land was wild and unoccupied. Watson v. Holliday, 37 Fla. 488, 19 South. 640. The fact that a petition to quiet title to several lots showed that the defendant was in possession of one of the lots did not render it subject to a general demurrer. Aldrich v. Boice, 56 Kan. 170, 42 Pac. 695. An allegation in a petition under Ky. St. § 11, that plaintiff is the owner and in possession of the tract of land in dispute, is a substantial statement that plaintiff is in actual possession. Weaver v. Bates (Ky.) 33 S. W. 1118. The want of an averment that the complainant is in possession is waived, where the objection is not taken by demurrer or by plea or answer. Gage v. Schmidt, 104 Ill. 106. Possession was not absolutely necessary to enable one to maintain a bill to relieve his title to land from an incumbrance. Methodist Episcopal Church v. Clark, 41 Mich. 730, 3 N. W. 207.

[10] Patton v. Crumpler, 20 Fla. 573, 11 South. 225. See Sloan v. Sloan, 25 Fla. 53, 5 South. 603; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623.

the claim of the defendant is a hostile one,[11] as well as that there is a real or threatened injury to the complainant by a statement of the facts by reason of which the injury has been or may be occasioned.[12] The title of the complainant may be only an equitable one, with the right to immediate possession, and in any case does not seem to require a detailed statement of its nature and extent;[13] and it seems also sufficient to show the fact of the opposing hostile claim by a general allegation of its existence.[14]

[11] See supra, note 4; Campbell v. Disney, 93 Ky. 41, 18 S. W. 1027. Where the petition in an action of quia timet to quiet title to land fails to allege that the title claimed by defendant is hostile to that of plaintiff, an allegation in the answer that defendant is the owner will cure the defect. Girdner v. Girdner (Ky.) 32 S. W. 266.

[12] Welles v. Rhodes, 59 Conn. 498, 22 Atl. 286; Barker v. Vernon Tp., 63 Mich. 516, 30 N. W. 175. A bill to quiet title must show in some way that defendant is setting up a cloud on the title, and either describe how, or explain why, the method cannot be described. Jenks v. Hathaway, 48 Mich. 536, 12 N. W. 691.

[13] Gage v. Kaufman, 133 U. S. 471, 10 Sup Ct. 406; Wilson v. Wilson, 124 Ind. 472, 24 N. E. 974; Statham v. Dusy (Cal.) 11 Pac. 606; Stanley v. Holliday, 130 Ind. 464, 30 N. E. 634. As to construction of allegations under a statute providing for actions, by one "in possession," to determine adverse claims, see Northern Pac. R. Co. v. Amacker, 1 C. C. A. 345, 49 Fed. 529. A bill to quiet title is specially demurrable if it merely states that the county records indicate that defendant has or appears to have some interest in said land by reason of certain tax titles executed to him by the auditor general for delinquent taxes of specified years. It should give the date and description of the deeds, and show where in the records they are recorded, and whether defendant claims all or only part of the land, and whether the interest claimed is entire or undivided. It should also show what defendant has done or failed to do, to complainant's prejudice, and aver any neglect or refusal on his part to do justice. Jenks v. Hathaway, 48 Mich. 536, 12 N. W. 691. A bill to remove from complainant's title a cloud caused by the fraudulent procurement of a deed is open to criticism if it does not show whether the charge against defendant is one of forgery, or of the procurement of a genuine signature to a genuine deed by fraud practiced on the grantor. Foster v. Hill, 55 Mich. 540, 22 N. W. 30.

[14] Campbell v. Disney, 93 Ky. 41, 18 S. W. 1027; Amter v. Conlon, 3 Colo. App. 185, 32 Pac. 721.

The Prayer.

This should be both special and general, in accordance with the principles previously noticed, in order to obtain relief appropriate to the particular case.[15]

160. BILLS OF PEACE—A bill of peace is one filed where numerous persons have a community of interest, or a common right or title in the subject-matter in controversy, as against a common adversary, or where each may sue or defend against such adversary in equity upon the same questions of law and fact, to determine the rights of all parties in a single action, and thus avoid a multiplicity of suits. A community of interest merely in the questions of law or fact involved will not sustain the bill.

An instance of a bill falling under this head has previously been given, though the technical designation is strictly applied only in cases where the conditions are those above stated, or at least where some recognized ground for equitable interference appears, if the community of interest be wanting; the theory being that equity will assume the adjustment and settlement of the rights of all parties interested, under proper conditions, in a single proceeding,[1] in order to avoid a multiplicity of suits.[2] Bills for this purpose are not common

[15] See ante, p. 226.

§ 160. [1] Fetter, Eq. pp. 16–18. A bill of peace will not lie, where the rights and responsibilities of the several defendants neither arise from nor depend upon, nor are in any way connected with, each other. Randolph's Adm'x v. Kinney, 3 Rand. (Va.) 394.

[2] Where the liability of complainant to a multiplicity of actions is the result of his own voluntary act, equity will not afford relief. Jones v. Oil Co., 17 Ill. App. 111. And, to warrant a court of equity in assuming jurisdiction to prevent a multiplicity of suits, it must appear that the party has some defense to the threatened litigation. Storrs v. Railroad Co., 29 Fla. 617, 11 South. 226. "These bills are resorted to where several persons claim a right as against one or more, or one or more against many; and in such cases the rule which requires all persons interested to be made parties is relaxed, and courts of equity allow only a sufficient number of persons to be made parties to honestly and fairly defend the rights involved. * * * There is another class of

enough to justify extended notice in a work of this character, and, when used, their essential structure will be regulated by the principles laid down in the previous part of this chapter.[3] They may be used to settle disputes as to rights in common between numerous tenants on the one side, and their landlord on the other,[4] or between the claimant of an exclusive right of fishing and riparian owners claiming adversely to such right;[5] or between numerous claimants of an easement and one obstructing its enjoyment;[6] or to settle the rights of numerous mill owners to draw water from a common reservoir.[7] There must be a community of interest or common right or title as against one in opposition,—a case where each of the numerous persons whose rights are involved could proceed in equity against such person, when the same questions of law or fact are involved, or, if the

cases where bills of this kind are brought, viz. where a right claimed by an individual is indefinitely litigated by him without success." Per Murray, C. J., in Ritchie v. Dorland, 6 Cal. 33, 38.

[3] Ante, p. 193. "A 'bill of peace' is said to be a bill brought by a person to establish and perpetuate a right which he claims, and which, from its nature, may be controverted by different persons at different times, and by different actions, or where separate attempts have been made to overthrow the same right, and justice requires that the party should be quieted in his right. In such cases a court of chancery, in furtherance of the policy of the law, will interpose to prevent harassing litigation, and perpetually enjoin those claiming adversely from prosecuting their claims against the person showing himself clothed with the legal right." Per Murray, C. J., in Ritchie v. Dorland, 6 Cal. 33, 37. "There are two kinds of bills of peace, and only two kinds. The first is, where courts of equity, upon the sole ground of preventing multiplicity of suits, will try a title or have it tried upon proper issues, because there is a number of persons interested in it, and a great many actions at law would be necessary to conclude the title. Suits concerning fisheries, parochial titles, etc., are of this kind, and fall within this class. Another class of cases is where the title has been fully and satisfactorily litigated at law." Per Napton, J., in Patterson v. McCamant, 28 Mo. 210. "To put at rest the controversy and determine the extent of the rights of the claimants of distinct interests in a common subject the bill lies, which is thus essentially one for peace." Sharon v. Tucker, 144 U. S. 542, 12 Sup. Ct. 720.

[4] How v. Tenants of Bromsgrove, 1 Vern. 22; Powell v. Earl of Powis, 1 Younge & J. 158.

[5] Mayor of York v. Pilkington, 1 Atk. 282.

[6] See Cadigan v. Brown, 120 Mass. 493.

[7] Adams v. Manning, 48 Conn. 477.

common interest is wanting, specific facts warranting equitable interference. A community of interest only in the questions involved, or practically only in the result of the proceeding, is not sufficient.[8]

161. BILLS TO REFORM INSTRUMENTS—A bill of this class is one filed to reform or correct a written instrument which fails to express the actual agreement which it was given to effectuate, either by reason of fraud, accident, or mistake in the original agreement, or from error in reducing to written form the agreement actually made.

162. The bill must essentially contain:

(a) A statement describing the defective instrument and the facts of the parol agreement which such instrument was intended to represent, the error complained of, and the manner in which it arose or was occasioned.

(b) Facts showing a legal injury to the complainant, or a case of fraud, accident, or mutual mistake.

(c) A prayer for relief.

163. In regard to the original agreement, the error may have arisen from mutual mistake, or from mistake on one side, and fraud on the other, or from simple accident or mistake in reducing such agreement to writing. The bill must therefore sufficiently allege fraud, accident, or mistake, as the case may be, or the circumstances from which fraud or mistake

[8] Tribette v. Railroad Co., 70 Miss. 182, 12 South. 32. See, also, to the effect that the mere threat of litigation involving the same questions will not be sufficient to sustain a bill of peace. Lehigh Valley R. Co. v. McFarlan, 31 N. J. Eq. 730; National Park Bank of New York v. Goddard, 131 N. Y. 494, 30 N. E. 566. See, also, Farmington Village Corp. v. Sandy River Nat. Bank, 85 Me. 47, 26 Atl. 965. As to the exercise of equitable jurisdiction to prevent repeated trespasses, see Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686; Warren Mills v. New Orleans Seed Co., 65 Miss. 391, 4 South. 298; or to abate a continuing nuisance, Kavanagh v. Railroad Co., 78 Ga. 271, 2 S. E. 636; but in such case the title to the land affected must not be in dispute, Carney v. Hadley, 32 Fla. 344, 14 South. 4.

are necessarily implied, and, in case of mistake, must also allege that the same was mutual when appearing in the original agreement, but not in case of error in reducing the same to writing.

The reformation of written instruments is exclusively a subject of equity jurisdiction, courts of common law possessing no power to correct or modify their terms in accordance with the real intention of the parties.[1] But, while the powers of courts of equity are frequently exercised for this purpose, the case must always be one where either fraud, accident, or mistake has resulted in something not contemplated by one or all of the parties to an agreement;[2] and it must also be one where the grounds for the reformation sought can be clearly established,[3] since a written contract is always presumed to express the actual intention of the parties to it, and is therefore taken as the best evidence of such intention. If the case is one of mistake only, it must always be mutual,[4] but not, of course, where the case is one of mistake on one side, and fraud on the other, in taking advantage of such mistake.[5] Again, if the mistake is simply one of reducing the agreement to writing, it is immaterial whether such mistake is one of

§§ 161–163. [1] Fetter, Eq. 314. A mere misapprehension as to the legal effect of terms used in a contract will not, it seems, be sufficient to obtain a decree reforming it. Calverly v. Harper, 40 Ill. App. 96. But equity will reform an instrument which fails to express the contract made through a mistake in reducing it to writing, though to some extent a mistake of law is involved. March v. McNair, 48 Hun (N. Y.) 117. And a contract may be reformed, and enforced as reformed, in the same action. Avery v. Society, 52 Hun, 392, 5 N. Y. Supp. 278.

[2] See Appeal of Hollenback, 121 Pa. 322, 15 Atl. 616; Greeley v. De Cottes, 24 Fla. 475, 5 South. 239. Cf. Ray v. Ferrell, 127 Ind. 570, 27 N. E. 159; Nagel v. Schneider, 83 Mich. 407, 47 N. W. 318.

[3] Henkle v. Assurance Co., 1 Ves. Sr. 317, 318; Ford v. Joyce, 78 N. Y. 618; Muller v. Rhuman, 62 Ga. 332; First Presbyterian Church v. Logan, 77 Iowa, 326, 42 N. W. 310.

[4] Fetter, Eq. 314, and note 2. In order to sustain a bill in equity to reform a deed on the ground of mistake, there must be full and satisfactory proof that it does not conform to the oral contract as understood by either party. Sawyer v. Hovey (Mass.; 1862) 3 Allen, 331.

[5] Bryce v. Insurance Co., 55 N. Y. 240.

law or one of fact,[6] though in other cases reformation will not generally be decreed for anything but mistake of fact.[7] And, in addition to the above, the complainant who seeks the aid of the court in this respect must not have been guilty of gross negligence,[8] and must file his bill without unnecessary delay.

The Statement.

The statement of the cause of action must set forth the instrument to be reformed, and the real agreement entered into,[9] the error complained of,[10] and the means by which or the manner in which such error was occasioned.[11] The statement of the parol contract, as well as that of the facts constituting the error, must be clear and explicit,[12] and it must also be alleged that the latter was occasioned by either fraud, accident, or mistake, as the case may be, or facts must be stated from which fraud or mistake will be necessarily implied.[13] A mistake in the original agreement should be alleged to have been mutual,[14] but, where that was correctly made and accepted, an error

[6] Park Bros. & Co. v. Blodgett & Clapp Co., 64 Conn. 28, 29 Atl. 133; Lee v. Percival, 85 Iowa, 639, 52 N. W. 543.

[7] See Fetter, Eq. 118–121, and cases cited.

[8] Duke of Beaufort v. Neeld, 12 Clark & F. 248; Grymes v. Sanders, 93 U. S. 55. See Werner v. Rawson, 89 Ga. 620, 15 S. E. 813.

[9] Thompsonville Scale Manuf'g Co. v. Osgood, 26 Conn. 16.

[10] Bishop v. Insurance Co., 49 Conn. 167; Anderson v. Logan, 105 N. C. 266, 11 S. E. 361. And the mistake alleged must be established beyond reasonable controversy. Franklin v. Jones, 22 Fla. 526.

[11] Appeal of Hollenback, 121 Pa. St. 322, 15 Atl. 616. A complaint in equity to reform a deed absolute on its face, and have it made a deed of trust, in accordance with the intention of the parties, must not only aver that agreed conditions for the transfer of the property were "fraudulently suppressed" by the defendants, but must set forth the facts and circumstances of fraud practiced by them to effect such suppression. Kent v. Snyder, 30 Cal. 666.

[12] Meier v. Kelly, 20 Or. 86, 25 Pac. 73. See Hyland v. Hyland, 19 Or. 51, 23 Pac. 811, where a complaint was held defective in not setting out fully the parol agreement, though the defect was waived by the defendant's answering. The equitable power of reformation cannot be invoked to correct a mistake, without formally pleading the mistake. Anderson v. Logan, 105 N. C. 266, 11 S. E. 361.

[13] Appeal of Hollenback, 121 Pa. St. 322, 15 Atl. 616. See Archer v. Lumber Co., 24 Or. 341, 33 Pac. 526.

[14] As to what is a sufficient allegation of mutual mistake, see Newton v. Hull, 90 Cal. 487, 27 Pac. 429. The fact that a bill alleged mistake of the attorney

simply in reducing such contract to writing does not require such allegation;[15] and it seems that, where fraud or bad faith is alleged as a ground for reformation, a previous request to have the mistake corrected is also unnecessary.[16] The statement should be sufficiently clear and explicit to show the equity of the complainant,[17] and a proper degree of diligence on his part in filing his bill, as well as a want of negligence,[18] and must disclose something more than a misunderstanding as to the legal effect of terms used,[19] or that one did not correctly understand the nature of an agreement actually entered into, and with perfect good faith, on the part of the other.[20]

The Prayer.

This should specifically ask for the relief desired, as, for instance, the manner in which the description in a deed or mortgage is to be changed, or the terms of a written contract altered, with a general prayer to obtain such further relief as the facts shown may warrant.[21]

164. BILLS FOR SPECIFIC PERFORMANCE—A bill for specific performance is one filed by one of the parties to a legal contract, against the other party or parties to it, to obtain a decree that such contract be actually carried into effect according to its terms.

in drawing the deed, while the court found that it was the mutual mistake of the parties, was held not a fatal variance, when not objected to at the trial. Cordes v. Coates, 78 Wis. 641, 47 N. W. 949.

[15] Born v. Schrenkeisen, 110 N. Y. 55, 17 N. E. 339.

[16] Miller v. Railroad Co., 83 Ala. 274, 4 South. 842. See Weathers v. Hill, 92 Ala. 492, 9 South. 412.

[17] Meier v. Kelly, 20 Or. 86, 25 Pac. 73. See Greeley v. De Cottes, 24 Fla. 475, 5 South. 239; Daggett v. Ayer, 65 N. H. 82, 18 Atl. 169.

[18] Meier v. Kelly, 20 Or. 86, 25 Pac. 73.

[19] Calverly v. Harper, 40 Ill. App. 96; Fowler v. Black, 136 Ill. 363, 26 N. E. 506. See Bowden v. Bland, 53 Ark. 53, 13 S. W. 420. A mistake common to the parties and the scrivener, whereby land intended to be mortgaged was imperfectly described, is a mistake of fact, and not of law. Whipperman v. Dunn, 124 Ind. 349, 24 N. E. 1045. See, also, Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391.

[20] See Roemer v. Conlon, 45 N. J. Eq. 234, 19 Atl. 664; Ellison v. Fox, 38 Minn. 454, 38 N. W. 358.

[21] See ante, p. 220.

165. To sustain it, the case must be one where the complainant cannot obtain adequate compensation for the breach by the recovery of damages, in an action at law, and the contract must also be one which a court of equity can properly and effectually enforce.

166. The bill must essentially contain:

(a) A statement of the terms and conditions of the contract, and, in general, the circumstances under which it was made, the property affected, and its ownership, the legal obligations thereby created, and part performance, payment, or tender of payment, or a readiness and an offer to perform by the complainant, where necessary to ground the right of action.

(b) The neglect or refusal of the defendant to perform the obligation resting upon him. Demand for performance should generally be made by the complainant, except where the respondent wholly denies the contract.

(c) A prayer for relief.

167. The complainant's title to the property affected, if material, must be fully stated and proved, and the averment of part performance should state what was in fact done.

Compelling the specific performance of contracts, where the party seeking relief cannot obtain adequate compensation for a breach by the recovery of damages in an action at law, is one of the most important heads of equitable jurisdiction; but, to obtain relief of this character, not only the want of an adequate remedy at law must exist, but the contract must be a legal one, entered into by parties capable of contracting, founded upon a sufficient consideration, and one which the court can enforce according to its specific provisions.[1] It must

§§ 164–167. [1] Adams, Eq. 77 et seq.; Fetter, Eq. c. 12, § 176 et seq. See Minturn v. Seymour, 4 Johns. Ch. (N. Y.) 497, 500; Hall v. Warren, 9 Ves. 605; Johnson v. Brooks, 93 N. Y. 337; Ross v. Purse, 17 Colo. 24, 28 Pac. 473; Woods v. Evans, 113 Ill. 186; Phyfe v. Wardell, 2 Edw. Ch. (N. Y.) 47;

also be one as to which the decree sought can be properly rendered, as, for instance, a contract for the sale and delivery of certain personal property, having a special character or value, or for the sale of a particular tract of land, since in such case damages would afford no sufficient compensation for a breach;[2] and not one for hiring and service, or one generally dependent upon personal considerations,[3] nor one terminable at the will of either party, since in the latter case the court would be powerless to supervise and insure performance.[4] The specific completion of a contract partly performed will often be decreed, however, where the court would have refused its aid if nothing had been done.[5]

The Statement.

The contract sought to be enforced must be fully and clearly set forth,[6] as it is incumbent upon the complainant to show that it is one which can be fairly and effectually executed,[7] and the legal obliga-

Dodd v. Seymour, 21 Conn. 476. To constitute a defense, it seems that illegality must be clearly made out. Baggott v. Sawyer, 25 S. C. 405; Sprague v. Rooney, 104 Mo. 349, 16 S. W. 505.

[2] See Hall v. Warren, 9 Ves. 605; Page v. Martin, 46 N. J. Eq. 585, 20 Atl. 46; Jackens v. Nicolson, 70 Ga. 200; Popplein v. Foley, 61 Md. 381. See, also, Pusey v. Pusey, 1 Vern. 273; Johnson v. Brooks, 93 N. Y. 337; Dilburn v. Youngblood, 85 Ala. 449, 5 South. 175; Jones v. Newhall, 115 Mass. 244.

[3] See Fetter, Eq. § 178; Johnson v. Railroad Co., 3 De Gex, M. & G. 914, 926; Wm. Rogers Manuf'g Co. v. Rogers, 58 Conn. 356, 20 Atl. 467; Chinnock v. Sainsbury, 30 Law J. Ch. 409; Campbell v. Rust, 85 Va. 653, 8 S. E. 664; May v. Thomson, 20 Ch. Div. 705.

[4] Ante, p. 260.

[5] Price v. Mayor, etc., of Penzance, 4 Hare, 506; Ross v. Railway Co., Woolw. 40, Fed. Cas. No. 12,080; Birchett v. Bolling, 5 Munf. (Va.) 442. This does not refer to a case where the contract is invalid under the statute of frauds.

[6] Forsyth v. Clark, 8 Wend. (N. Y.) 637; Mallory v. Mallory, 1 Busb. Eq. (N. C.) 80; Carswell v. Walsh, 70 Md. 504, 17 Atl. 335. But the contract need not be stated as being in writing, Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753; as it will be presumed to be such as is required by the statute of frauds, unless the contrary appears, Cozine v. Graham, 2 Paige (N. Y.) 177. As to alleging consideration, see Byars v. Thompson, 80 Tex. 468, 15 S. W. 1087.

[7] May v. Fenton, 7 J. J. Marsh. (Ky.) 306. A bill for a decree for the specific performance of a contract for the sale of real estate is addressed to the sound discretion of the court. Mansfield v. Sherman, 81 Me. 365, 17 Atl. 300. The bill sufficiently alleges ownership in the defendant to be good after decree, where it alleges that the defendant is in possession, and the proof shows ownership. Northrop v. Boone, 66 Ill. 368.

tions created by it must also be alleged.[8] The property in question, whether real or personal, should be described with sufficient accuracy for purposes of identification,[9] and its ownership alleged; and if the refusal of the defendant to perform is based upon an alleged defect in the title to such property, as where the purchaser of a tract of land declines to complete his purchase on that ground, the facts of such title must be fully stated.[10] As he who seeks equity must do equity, it must also appear that the complainant has done or performed everything necessary, in the particular case, to entitle him to a performance of the contract by the defendant,[11] or that he has offered to do, and is still ready to do, all that is required of him;[12] and this, it has been held, must be not by a general allegation "that he has done all that he was bound by the contract to do," or that he has "offered and has always been ready and willing to comply with his contract," but by a clear statement of the facts constituting such part performance[13] or such offer,[14] though, according to recent decisions, it seems that, in suits for the specific performance of contracts to convey land, a demurrer will not lie for failure to allege payment of the cash payment

[8] Guadalupe Co. v. Johnston, 1 Tex. Civ. App. 713, 20 S. W. 833.

[9] Gray v. Davis, 3 J. J. Marsh. (Ky.) 381; Allen v. Chambers, 4 Ired. Eq. (N. C.) 125; Askew v. Carr, 81 Ga. 685, 8 S. E. 74. A description of land by a name well known, and which distinguishes it from other property, is sufficient. Goodenow v. Curtis, 18 Mich. 298. And if the description is complete and certain, its falsity is a matter of defense only. Williams v. Langevin, 40 Minn. 180, 41 N. W. 936. As to the form of the bill, where it is sought to reform a written contract and enforce it in the same action, see Bacon v. Leslie, 50 Kan. 494, 31 Pac. 1066.

[10] Cornell v. Andres, 36 N. J. Eq. 321.

[11] Doyle v. Teas, 5 Ill. 202; Underhill v. Allen, 18 Ark. 466; Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131. See Chadbourne v. Stockton Sav. & Loan Soc., 88 Cal. 636, 26 Pac. 529; King v. Gildersleeve, 79 Cal. 504, 21 Pac. 961. In general, where a portion of the purchase money is unpaid, the bill should aver a tender and offer to bring the money into court. But the circumstances may take the case out of the rule. De Wolf v. Pratt, 42 Ill. 198.

[12] See St. Paul Division No. 1 v. Brown, 9 Minn. 157 (Gil. 144); Deglow's Ex'r v. Meyer (Ky.) 15 S. W. 875; Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19.

[13] Davis v. Harrison, 4 Litt. (Ky.) 261. See Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19.

[14] Hart v. McClellan, 41 Ala. 251. See Deglow's Ex'r v. Meyer (Ky.) 15 S. W. 875.

agreed, or the execution, tender, or delivery of a mortgage to secure deferred payments, when it is alleged that the plaintiff has duly performed all the conditions of the contract on his part.[15] In some cases, where the payment of money by the complainant is to be made as his part of the contract, the bill should allege a tender of the money when due, a continued readiness to pay it, and an offer to bring the same into court,[16] unless the case is one where it appears that a tender would have been a useless formality, and the court has power to compel the payment of the money.[17]

The bill must also show the refusal or neglect of the defendant to perform his part of the contract in question that has resulted or will result in injury to the complainant,[18] and unless the former wholly denies the contract,[19] or the circumstances are such that it would be of no effect, a demand for performance before the suit was commenced.[20] The facts stated must show that the recovery of damages at law would not compensate the complainant for the breach complained of,[21] as well as that the aid of the court has been invoked without unreasonable delay,[22] as the aid of the court will not be extended unless the former

[15] Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19.

[16] Bass v. Gilliland, 5 Ala. 761.

[17] Moore v. Crawford, 130 U. S. 122, 9 Sup. Ct. 447.

[18] See Lattin v. Hazard, 85 Cal. 58, 24 Pac. 611; De Lacy v. Walcott (Super. N. Y.) 21 N. Y. Supp. 619. In a bill for specific performance of a contract to procure the surrender of a lease held by the defendant and his partner, it is not necessary to allege that defendant is able to procure his partner to execute such surrender. Borden v. Curtis, 46 N. J. Eq. 468, 19 Atl. 127. See, also, Stephens v. Soule, 83 Cal. 438, 23 Pac. 523.

[19] Pawlak v. Granowski, 54 Minn. 130, 55 N. W. 831.

[20] See Harshman v. Mitchell, 117 Ind. 312, 20 N. E. 228; Denlar v. Hile, 123 Ind. 68, 24 N. E. 170.

[21] McClane v. White, 5 Minn. 178 (Gil. 139); Angus v. Robinson's Adm'r, 62 Vt. 60, 19 Atl. 993.

[22] McCabe v. Mathews, 40 Fed. 338. For instances of the application of the equity rule as to laches in bringing suit, see Butler v. Archer, 76 Iowa, 551, 41 N. W. 309; Day v. Hunt, 112 N. Y. 191, 19 N. E. 414; Brown v. Sutton, 129 U. S. 238, 9 Sup. Ct. 273; Peters v. Canfield, 74 Mich. 498, 42 N. W. 125; Chicago, R. I. & P. Ry. Co. v. Wisconsin, I. & N. Ry. Co., 76 Iowa, 615, 41 N. W. 375; Deen v. Milne, 113 N. Y. 303, 20 N. E. 861; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921; Norman v. Bennett, 32 W. Va. 614, 9 S. E. 914; Frame v. Frame, 32 W. Va. 463, 9 S. E. 901; Hunkins v. Hunkins, 65 N. H. 95, 18 Atl. 655; Cocanougher v. Green, 93 Ky. 519, 20 S. W. 542; Hall v. Railway Co., 143 Ill. 163, 32 N. E. 598; Knox v. Spratt, 23 Fla. 64, 6 South. 924.

appears, as, for instance, that personal property contracted for is of such a nature and value that the complainant must obtain the specific article, or suffer loss, or that, for similar reasons, a payment of money will not compensate for the failure to receive title to a specific tract of land; and neglect to institute proceedings will in many cases bar any right of recovery, unless accompanied by circumstances showing a clear excuse or justification.

The Prayer.

The objects of a bill for specific performance would seem to emphasize the necessity of praying specifically for the relief desired, as well as by the general prayer, as the facts shown in such cases might not clearly indicate all that is desired, though the court will give such relief as is possible under the general prayer.[23]

168. BILLS TO SET ASIDE FRAUDULENT CONVEYANCES—A bill of this character is one filed to set aside a conveyance by an insolvent of his property, made with intent to hinder, delay, or defraud existing or contemplated creditors, and to subject such property to the payment of their claims.

169. The bill must essentially contain:

(a) A statement showing the complainant's interest and right to sue, and the interest of the defendant, including the fact that there are creditors and the insolvency of the debtor by whom the transfer was made.

(b) A statement of the execution and delivery of the conveyance in question, the fraudulent intent with which it was made, and an actual or threatened injury resulting therefrom.

(c) A prayer for relief.

A delay of 14 years in bringing suit for specific performance is not excused by a general allegation of ignorance, without specific facts showing good reasons therefor. Haggerty v. Land Co., 89 Ala. 428, 7 South. 651.

[23] See the following cases of relief under the general prayer: Stevens v. Guppy, 3 Russ. 171; Powell v. Young, 45 Md. 494; Kirksey v. Means, 42 Ala. 426; Bullock v. Adams, 20 N. J. Eq. 367; Hart v. Granger, 1 Conn. 154; Shenandoah Val. R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239.

170. It must appear that the conveyance was made with the intent either to delay, hinder, or defraud existing creditors, by placing the debtor's property beyond their reach, or to dispose of property in anticipation of and with the intention of defeating debts to be thereafter contracted, and which the debtor has reasonable grounds to believe he will be unable to pay. The insolvent condition of the debtor must always appear, as well as that the claim of the creditor filing the bill is due and demandable at the time of suit brought.

The jurisdiction of equity is frequently exercised to set aside conveyances made by an insolvent debtor with intent to delay, hinder, or defraud existing or contemplated creditors, and to take charge of the property thus transferred, and apply the same ratably to the payment of all creditors.[1] Various statutes were passed in England to confirm and extend the common-law rule in cases of this character, such as 13 and 27 Eliz. and 3 Henry VIII., the first of which has been generally re-enacted or followed in this country;[2] and there are now in each state more or less comprehensive laws for the protection of the creditors of insolvents, containing provisions designed to prevent transfers of property in fraud of the rights of such creditors, and especially the giving of preferences to one creditor over another.[3] Whether a conveyance is to be deemed fraudulent or not, therefore, may depend upon the wording of a particular statute; but in general the term is applied to all actual transfers by an insolvent debtor with the intent

§§ 168–170. [1] See Wolf v. McGugin, 37 W. Va. 552, 16 S. E. 797. A judgment creditor may file a bill for the double purpose of reaching property not open to execution, e. g. equitable assets and choses in action, and of aiding an execution by setting aside a fraudulent conveyance. Williams v. Hubbard, Walk. (Mich.) 28; Beam v. Bennett, 51 Mich. 148, 16 N. W. 316; Reeg v. Burnham, 55 Mich. 39, 20 N. W. 708, and 21 N. W. 431.

[2] The statute of 13 Eliz. c. 5, has been universally adopted in this country, and the others mentioned in the text have been adopted or followed in some states. See Cathcart v. Robinson, 5 Pet. 263; Sewall v. Glidden, 1 Ala. 52; Teasdale v. Atkinson, 2 Brev. (S. C.) 48; Gardner v. Cole, 21 Iowa, 205; Robinson v. Holt, 39 N. H. 557; Wilson v. Cheshire, 1 McCord, Eq. (S. C.) 233.

[3] See the insolvent laws of the different states.

to hinder, delay, or defraud his creditors [4] of property out of which such creditors might have obtained full or partial satisfaction of their claims.[5] The fraudulent intent is the essential element,[6] and must exist in both debtor and his grantee,[7] unless in the case of a voluntary conveyance without consideration, when the fraudulent intent of the grantor alone is sufficient; [8] and the intention may be inferred from all the circumstances surrounding the transfer,[9] or from particular facts, such as great inadequacy of consideration,[10] or retention of pos-

[4] Whatever the legal effect of a deed, if the parties to it supposed that it would have the effect to hinder or delay a creditor, the fact that this object was not accomplished would not relieve the disability attached to the fraudulent intention. Drum v. Painter, 27 Pa. St. 148.

[5] Hoyt v. Godfrey, 88 N. Y. 669.

[6] Moore v. Hinnant, 89 N. C. 455; Worthy v. Brady, 91 N. C. 265, 269. See Babcock v. Eckler, 24 N. Y. 623, 632. A conveyance of property absolute in terms, but in fact a mere security, is fraudulent as against the grantor's creditors, though no fraud was intended. Watkins v. Arms, 64 N. H. 99, 6 Atl. 92.

[7] Mere knowledge of the fraud by the grantee will not of itself invalidate the transfer; there must be in some way a participation in the fraud, Fraser v. Passage, 63 Mich. 551, 30 N. W. 334; Morgan v. Wood, 38 Mo. App. 255; Rindskopf v. Vaughan, 40 Fed. 394; as by accepting a chattel mortgage to secure his own debt, with the additional purpose of enabling the mortgagor to defraud his creditors, Ley v. Reitz, 25 Ill. App. 615. Cf. Spear v. Joyce, 27 Ill. App. 456. But the facts surrounding the transfer may constitute such badges of fraud that a purchaser would be charged with notice of the fraudulent intent, and could not, therefore, be regarded as a bona fide purchaser. See Hanchett v. Goetz, 25 Ill. App. 445; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, and 44 N. W. 766; Adler-Goldman Commission Co. v. Hathcock, 55 Ark. 579, 18 S. W. 1048; Blum v. Simpson, 66 Tex. 84, 17 S. W. 402. See, also, Chaffee v. Gill, 43 La. Ann. 1054, 10 South. 361.

[8] This is on the principle that an equity founded on a valuable consideration is superior to one founded on a mere voluntary transfer or gift. See Laughton v. Harden, 68 Me. 208, 213; Marden v. Babcock, 2 Metc. (Mass.) 99, 104; York v. Rockwood, 132 Ind. 358, 31 N. E. 1110.

[9] See Lyne v. Bank, 5 J. J. Marsh. (Ky.) 545; Constantine v. Twelves, 29 Ala. 607.

[10] Hamet v. Dundass, 4 Pa. St. 178; Bay v. Cook, 31 Ill. 336; Helms v. Green, 105 N. C. 251, 11 S. E. 470. Inadequacy of consideration alone will not avoid a transfer, unless it is so gross that the inference of fraud is irresistible. See Gwynne v. Heston, 1 Brown, Ch. 1, 8; Matthews v. Crockett's Adm'r, 82 Va. 394; Hamblin v. Bishop, 41 Fed. 74; Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39; Phillips v. Pullen, 45 N. J. Eq. 5, 830, 16 Atl. 9, and 18 Atl. 849. But a person claiming the benefit of a transfer will be held to show

session by the debtor after the conveyance.[11] Conveyances made in good faith, and for valuable consideration, without notice of any fraud or collusion, were excepted from the operation of the statute of 13 Eliz., and are still protected, the laws now in force generally defining what conveyances shall be so regarded.

The Statement.

The statement of the cause of action in suits of this character will necessarily vary according to particular circumstances, but in general it must show the complainant a creditor, either at the time of the transfer or by reason of a debt subsequently contracted,[12] the character of his demand,[13] and that it is due.[14] If the object of the suit is to set aside a conveyance fraudulent as to existing creditors, the fact that there were such at the time must be alleged;[15] and, if the case is one of a conveyance made with a view to defeat the collection of debts to be thereafter contracted, it must be averred that such debts were actually incurred by the debtor in pursuance of his fraudulent intent.[16] It must also be stated that property of the debtor was transferred from which such debts could have been wholly or partially satisfied;[17] and, as the foundation of the proceeding is the want of

entire good faith in a case where, though the consideration is not greatly inadequate, the attendant circumstances indicate concealment, oppression, or undue influence, or the person making the transfer is physically or mentally disabled or pecuniarily embarrassed. Tracey v. Sacket, 1 Ohio St. 54. And see Deane v. Rastron, 1 Anstr. 64; Burke v. Taylor, 94 Ala. 530, 10 South. 129.

[11] See Millard v. Hall, 24 Ala. 209; Mayer v. Clark, 40 Ala. 259; Fletcher v. Willard, 14 Pick. (Mass.) 464; Carter v. Graves, 6 How. (Miss.) 9; State v. Rosenfeld, 35 Mo. 472; Baltimore & O. R. Co. v. Hoge, 34 Pa. St. 214; Van Hook v. Walton, 28 Tex. 59.

[12] Burton v. Platter, 4 C. C. A. 95, 53 Fed. 901; Sawyer v. Harrison, 43 Minn. 297, 45 N. W. 434.

[13] The debt of a judgment creditor need not be described with the same definiteness required in a complaint to recover the debt. Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799.

[14] Gibson v. Furniture Co., 93 Ala. 579, 9 South. 370. To entitle the assignee of a judgment to proceed in equity to subject to the payment of his debt property fraudulently conveyed, it is not necessary to allege in the bill that the assignment was in writing. Jones v. Smith, 92 Ala. 455, 9 South. 179.

[15] Burton v. Platter, 4 C. C. A. 95, 53 Fed. 901.

[16] Burton v. Platter, supra, and cases cited.

[17] Hoyt v. Godfrey, 88 N. Y. 669. In an action to set aside, as fraudulent, a deed of lands, the habendum clause of which reads, "to have and to hold

other means to satisfy the demands of the complainant, the insolvency of the debtor should also be alleged,[18] or that he did not retain sufficient property subject to execution to pay his debts,[19] except, perhaps, where actual fraud is asserted.[20]

Both the execution and delivery of the conveyance attacked must also be alleged,[21] as well as the fraudulent intent with which it was made, either to defeat the rights of existing creditors, or to put the property transferred out of reach of debts which the debtor intended thereafter to contract, and which he had reasonable grounds for believing he would be unable to pay,[22] and that the complainant has been injured thereby.[23] The intent may be shown by an allegation that the transfer in question was made "in bad faith, and with the intent to hinder, delay, and defraud creditors," as an allegation of the specific fact of an intent to defraud,[24] or by the statement of facts

what interest and title I may and do have by reason of my survivorship of my late wife to whom said lands belonged," it was held that the bill must show the extent and value of the grantor's interest, and deny the adequacy or payment of the consideration. Moorer v. Moorer, 87 Ala. 545, 6 South. 289.

[18] Miller v. Lehman, 87 Ala. 517, 6 South. 361; Shew v. Hews, 126 Ind. 474, 26 N. E. 483. See O'Donnell v. Polke, 12 Pa. Co. Ct. R. 638. A creditors' bill to reach equitable assets cannot be filed unless it appears that the remedy at law has been exhausted. Steward v. Stevens, Har. (Mich.) 169; Freeman v. Bank, Walk. (Mich.) 62; Tyler v. Peatt, 30 Mich. 63.

[19] Sell v. Bailey, 119 Ind. 51, 21 N. E. 338; York v. Rockwood, 132 Ind. 358, 31 N. E. 1110. See Petree v. Brotherton, 133 Ind. 692, 32 N. E. 300. An allegation that the conveyance left the grantor without any property subject to execution is not sufficient, however, without the additional averment that he had no property at the time the suit was brought out of which the debt could then be collected. Brumbaugh v. Richcreek, 127 Ind. 240, 26 N. E. 664.

[20] See Keller v. Whitledge, 38 Ill. App. 310.

[21] The averment of delivery is indispensable. Doerfler v. Schmidt, 64 Cal. 265, 30 Pac. 816.

[22] Burton v. Platter, 4 C. C. A. 95, 53 Fed. 901, and cases there cited. See McMahon v. Rooney, 93 Mich. 390, 53 N. W. 539.

[23] Fox v. Dyer (Cal.) 22 Pac. 257.

[24] National Union Bank of Dover v. Reed (Com. Pl.) 12 N. Y. Supp. 920. But in such case it seems that the question of fraud must be made one of fact only by statute, as general allegations of fraud are not sufficient as a rule. See Probert v. McDonald, 2 S. D. 495, 51 N. W. 212; Hutchinson v. Bank, 133 Ind. 271, 30 N. E. 952; Threlkel v. Scott, 89 Cal. 351, 26 Pac. 879; Martin v. Fox, 40 Mo. App. 664.

from which the fraud will be necessarily implied.[25] In this connection it should also be alleged that the person to whom the transfer was made had notice of and participated in such fraudulent intent of the party making it,[26] except in the case of a voluntary conveyance without consideration, when the fraud of the grantor raises the implication of fraud in his grantee.[27]

The Prayer.

As in the case of a bill for specific performance, there is a plainly indicated necessity here for a prayer clearly and specifically showing the exact nature and extent of the relief sought, and in this it seems proper to embody a prayer for an account of rents and profits of the property in question, where the conveyance related to land.[28] The form should be both specific and general, as in other cases.

171. BILLS FOR INFRINGEMENT OF PATENTS—A bill of this character is one brought by the owner or licensee of a patent, against a person guilty of violating the rights secured by such patent by the unlawful manufacture or sale of the patented article or thing, to obtain (1) an adjudication of the validity of such patent, and of his rights under the same; (2) the process of injunction to prevent the continuance of such infringement; (3) an accounting as to and a recovery of the gains and profits realized by

[25] As a general rule, the facts constituting the fraud must be specifically pleaded, or the bill will be demurrable. Rockford Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. 236; Gleason v. Wilson, 48 Kan. 500, 29 Pac. 698. See Sides v. Scharff, 93 Ala. 106, 9 South. 228; Loucheim v. Bank, 98 Ala. 521, 13 South. 374; Fox v. Dyer (Cal.) 22 Pac. 257. See, also, Hays v. Montgomery, 118 Ind. 91, 20 N. E. 646.

[26] See ante, p. 266.

[27] York v. Rockwood, 132 Ind. 358, 31 N. E. 1110. See, also, Laughton v. Harden, 68 Me. 208, 213; Marden v. Babcock, 2 Metc. (Mass.) 99, 104. In an action to set aside, on the ground of fraud, a voluntary deed from a husband to his wife, it is unnecessary to aver that the wife participated in the fraud, as fraud of the grantor is implied fraud on the part of a voluntary grantee. McGhee v. Bank, 93 Ala. 192, 9 South. 734. See Jordan v. Buschmeyer, 97 Mo. 94, 10 S. W. 616.

[28] See Hadley v. Morrison, 39 Ill. 393.

the defendant from such infringement; and (4) the surrender or destruction of articles or property manufactured or held in violation of the complainant's rights as established.

172. The bill must essentially contain:

(a) A statement showing all facts giving the complainant a right to sue, and a liability in the defendant, including a compliance with all statutory requirements, and an infringement by the defendant.

(b) A prayer for relief, generally including a prayer for an injunction.

The person entitled to the protection of letters patent, whether owner or licensee, has two remedies at his disposal in case his rights are violated by an infringement,—one by an action on the case, at law, for the recovery of damages, and the other and more effective one by bill in equity.[1] It is with the equitable proceeding only that we are concerned here, and a brief statement will serve to explain the essential requirements of this form of bill, as well as the principles upon which the interference of equity is based.

The grounds of the jurisdiction of equity in cases of patents are the prevention of irreparable mischiefs, the suppression of a multiplicity of suits and vexatious litigation, and the more complete discovery, from the party guilty of infringement, of the extent of the injury done to the patentee than can be obtained in an action at law.[2] The common-law method, while effective so far as damages could compensate for the violation of the rights secured by the patent, is wholly inadequate to fully protect such rights; as, for instance, to the extent of preventing a recurrence of the injury complained of, and equity here steps in with the process of injunction,—a preventive remedy, which we have already noticed,[3] and which is in such case indispensable for the protection of the legal right infringed.[4] The remedy by

§§ 171–172. [1] Curt. Pat. (4th Ed.) §§ 341a, 400; Hogg v. Kirby, 8 Ves. 223; Root v. Railway Co., 105 U. S. 189.

[2] Story, Eq. Jur. §§ 930–933.

[3] Ante, p. 117.

[4] To warrant the issue of a preliminary injunction, the bill must show both a prima facie title to the patent in the complainant and a prima facie case of

bill, which is in general use in cases of this character, is strictly, perhaps, a bill for an injunction, though it also contemplates an adjudication upon the rights of the complainant under the letters patent in question, and the fact of the violation of such rights by the infringing party, and seeks, in addition to the preventive remedy which is to restrain the defendant from further acts of infringement, an account of the gains and profits realized by him therefrom, as well as a surrender or destruction of such articles manufactured or held in violation of the rights secured by the patent as are yet unsold; in short, a complete establishment of the complainant's rights, including both the removal of all further chance of their violation, and of the consequences of infringements previously committed.

The rights of patentees are now so fully defined by statute, and the subject is so extensive, really including in its scope the remedy for infringement of copyrights and trade-marks, that an examination of the laws in question, as well as of the leading authorities, would be necessary for a full understanding of questions likely to arise.[5] It may be observed here, however, that the federal courts have exclusive jurisdiction in cases of patents and statutory copyrights,[6] while state courts may also have jurisdiction in trade-mark cases.[7]

The Statement.

The statement of the cause of action in a bill for the infringement of a patent requires both accuracy and completeness, since the question of identity is a most important one. In general, it must set forth the application for letters patent by the inventor, and must aver the full compliance by him with all prerequisites to obtain such patent, giving the title of the patent verbatim,[8] and alleging that the letters were duly attested by the proper officer, and their delivery to the complainant as the patentee.[9] Profert

infringement. 2 High, Inj. § 938. See Standard Paint Co. v. Reynolds, 43 Fed. 304.

[5] See Curt. Pat. (4th Ed.) and appendix; Walk. Pat. §§ 418 et seq., 572 et seq.; Fetter, Eq. pp. 306–310, and cases cited; Drone, Copyr. pp. 468, 496, et seq.

[6] Drone, Copyr. 545.

[7] U. S. v. Steffens, 100 U. S. 82; Small v. Sanders, 118 Ind. 105, 20 N. E. 296.

[8] See Wise v. Railroad Co., 33 Fed. 277. See, also, Poppenhusen v. Falke, 5 Blatchf. 46, Fed. Cas. No. 11,280.

[9] Curt. Pat. (4th Ed.) § 406 et seq. See, also, Sullivan v. Redfield, 1 Paine,

of the patent must also be made,[10] though a detailed description of the invention according to the specifications need not be made;[11] and it must appear that the complainant, after the patent issued, put his invention into use, and is, at the time of filing the bill, in the exclusive possession of it, and that such inventon had not been patented in any foreign country before the date of his invention, or in public use or on sale for more than two years prior to the application for letters patent therefor.[12] If there has been a renewal, extension, or amendment of the patent, or the complainant sues as assignee, either of a part or the whole interest of the patentee, or appears as an administrator or other representative, the fact of such renewal, etc.,[13] or the assignment or other derivative title or authority, must be clearly stated, in order to show the present state of the title, and the existence and nature of the right for which protection is asked.[14] The facts of the infringement constituting the injury must be alleged,[15] and whether the same has actually been committed or is threatened; and if the complainant's right has been established in an action at law, against the same or any other party, or an injunction has been issued against the same or another party, the fact should also be stated.[16]

The Prayer.

The prayer should be specific, generally asking for a discovery, an answer to interrogatories propounded, a general answer to the bill, a decree, an accounting, and that the respondent pay over the gains and profits which he has realized as a result of the infringe-

441, Fed. Cas. No. 13,597; Steam-Gauge & Lantern Co. v. McRoberts, 26 Fed. 765; McMillin v. Transportation Co., 18 Fed. 260.

[10] Curt. Pat. (4th Ed.) 406 et seq. See McMillin v. Transportation Co., 18 Fed. 260; Wilder v. McCormick, 2 Blatchf. 31, Fed. Cas. No. 17,650.

[11] Westhead v. Keene, 1 Beav. 287. And see Haven v. Brown, 6 Fish. Pat. Cas. 413, Fed. Cas. No. 6,228; Poppenhusen v. Falke, 5 Blatchf. C. C. 46, Fed. Cas. No. 11,280; Isaacs v. Cooper, 4 Wash. C. C. 259, Fed. Cas. No. 7,096.

[12] Curt. Pat. (4th Ed.) § 406 et seq.

[13] See Spaeth v. Barney, 22 Fed. 828.

[14] See Wollensak v. Reiher, 115 U. S. 96, 5 Sup. Ct. 1137.

[15] See McMillin v. Transportation Co., 18 Fed. 260; McCoy v. Nelson, 121 U. S. 484, 7 Sup. Ct. 1000.

[16] See Steam-Gauge & Lantern Co. v. McRoberts, 26 Fed. 765; American Bell Telephone Co. v. Southern Telephone Co., 34 Fed. 803.

ment, followed, of course, by the general prayer for such further relief as the case may justify.[17]

173. CREDITORS' BILLS—A creditors' bill is generally one filed to enforce the security of a judgment creditor against the property or interests of the debtor, on the theory that the judgment is a lien, and enforceable in equity as such. Strictly, it is a bill by which a creditor seeks to satisfy his debt out of some equitable estate of the defendant, which is not liable to levy and sale under execution at law.

174. The bill must essentially contain:

(a) A statement showing the complainant's title or interest in the subject-matter, and his right to sue, including a judgment at law upon which an execution has been issued and returned unsatisfied.

(b) A statement of facts showing an injury or wrong, actual or threatened, to the complainant.

(c) A prayer for relief.

175. If the case is one where the issuance and return of an unsatisfied execution is necessary to ground the right of action, it must appear that the defendant resided in the county to which such execution was issued.

Creditors' bills afford frequent instances where the powers of courts of equity are exercised to subject the property or interests of a debtor to the payment of a creditor's claim, when the latter has either obtained a specific lien upon the property in question, or has exhausted all available legal remedies for the satisfaction of his debt.[1] The strict definition above given is perhaps the more

[17] See the form of the prayer in bills of this character. Curt. Eq. Prec. §§ 173–175. [1] See McCalmont v. Lawrence, 1 Blatchf. 232, Fed. Cas. No. 8,676; Lyell v. St. Clair Co., 3 McLean, 580, Fed. Cas. No. 8,621; Pharis v. Leachman, 20 Ala. 662; In re Ingraham, 2 Barb. (N. Y.) 35; Montgomery v. McGee, 7 Humph. (Tenn.) 234; Thomas v. Adams, 30 Ill. 37; Baxter v. Moses, 77 Me. 405, 1 Atl. 350; McKeldin v. Gouldy, 91 Tenn. 677, 20 S. W.

correct one, as it is not always necessary that the claim shall have been reduced to a judgment, or, if that has been done, that the legal process of execution has been resorted to without obtaining satisfaction, as an attachment creditor can maintain a creditors' bill without waiting for judgment;[2] and, if the aid of the court is sought against real estate, the judgment lien suffices without an execution issued thereunder.[3] The general rule is that the creditor, to maintain his bill, must either stand as having a lien, or have exhausted all legal remedies, save where the administration of the estates of deceased persons is involved;[4] but there is also a class of cases where bills in the nature of creditors' bills can be maintained to set aside fraudulent conveyances, or remove clouds from a title, in order to open the way for the effective use of an execution.[5] Bills merely to set aside such conveyances or quiet title, without the additional object mentioned, are not creditors' bills, and have been elsewhere considered.[6]

Many of the states have passed statutes providing for the relief of creditors by proceedings supplementary to execution, but in those retaining a separate chancery jurisdiction the older method is still in use, though generally in a modified form. An examination of local laws will therefore be necessary in any given case, though, in general, the principles upon which this form of remedy is founded are substantially the same,—that the person seeking relief

231; Durand v. Gray, 129 Ill. 9, 21 N. E. 610; Cleveland Rolling-Mill Co. v. Joliet Enterprise Co., 53 Fed. 683; Ager v. Murray, 105 U. S. 126.

[2] Conroy v. Woods, 13 Cal. 626; Stone v. Anderson, 26 N. H. 506. See, also, Scott v. McMillen, 1 Litt. (Ky.) 302; Holt v. Bancroft, 30 Ala. 193; Tappan v. Evans, 11 N. H. 311; Cook v. Johnson, 12 N. J. Eq. 51; Sanderson v. Stockdale, 11 Md. 563; Steere v. Bigelow, 39 Ill. 264.

[3] Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 674; McNairy v. Eastland, 10 Yerg. (Tenn.) 310; Rhodes v. Cousins, 6 Rand. (Va.) 188; Smith v. Thompson, Walk. (Mich.) 1.

[4] When a creditor has exhausted his legal remedies, a court of equity will aid him to obtain a distributive share of his debtor in his own right, in the hands of the administrator in trust for the debtor. Stinson v. Williams, 35 Ga. 170; Brown v. Fuller, 13 N. J. Eq. 271.

[5] See Croone v. Bivens, 2 Head (Tenn.) 339; Sanderson v. Stockdale, 11 Md. 563; Cook v. Johnson, 12 N. J. Eq. 51. See, also, Holt v. Bancroft, 30 Ala. 193; Tappan v. Evans, 11 N. H. 311.

[6] Ante, pp. 248, 264.

must, in general, have reduced his claim to a judgment if it was in his power to do so,[7] or have acquired a lien upon specific property,[8] or be in a position to obtain a lien upon the removal of a fraudulent transfer,[9] and that all legal means for the collection of his debt have been exhausted.[10] Courts of equity are not tribunals for the collection of debts, and will only exercise these powers in aid of the creditor under one or more of the conditions above mentioned, unless under a jurisdiction enlarged by statute.

The Statement.

The statement of the cause of action in a creditor's bill will necessarily vary according to the position in which he stands, and the particular object of his suit. If he seeks the aid of the court against the real estate of his debtor, he must show in general a judgment at law creating a lien upon such real estate;[11] and, if his object is to reach personal estate, he must show, in addition, an execution sued out and pursued to every available extent. In the latter case it seems that it must appear that the judgment debtors were residents of the county to which the execution was issued, at the time it was issued;[12] but in the case of a bill filed to remove a cloud from a title, or to set aside a fraudulent conveyance, where the complainant claims a judgment lien, the allegation that an execution has been issued and returned unsatisfied is entirely unnecessary, though, to reach equitable assets alleged to have been fraudulently conveyed, facts must be stated which amount to reasonable proof of fraud, with corresponding averments, unless dispensed with by

[7] This is the general rule (see the cases cited under note 1, ante, p. 273); but see Case of Beauregard, 101 U. S. 688, as to an apparent exception in case of the insolvency of the debtor, and see, also, the cases cited under note 3, ante, 274. See, also, Holt v. Bancroft, 30 Ala. 193; Stephens v. Beal, 4 Ga. 319; Cook v. Johnson, 12 N. J. Eq. 51; Voorhees v. Reford, 14 N. J. Eq. 155.

[8] As by an attachment. Conroy v. Woods, 13 Cal. 626; Stone v. Anderson, 26 N. H. 506. See Holt v. Bancroft, 30 Ala. 193; Tappan v. Evans, 11 N. H. 311.

[9] See McCullough v. Colby, 5 Bosw. (N. Y.) 477; North American Fire Ins. Co. v. Graham, 5 Sandf. (N. Y.) 197.

[10] See the cases under note 1, ante, p. 273.

[11] Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 674; McNairy v. Eastland, 10 Yerg. (Tenn.) 310.

[12] Barrow v. Bailey, 5 Fla. 9; Young v. Frier, 9 N. J. Eq. 465; Rhodes v. Cousins, 6 Rand. (Va.) 188; Wilbur v. Collier, Clarke, Ch. (N. Y.) 315.

statute.[13] Whatever the special object of the bill, it must generally show that the creditor has exhausted all legal remedies available, or at least that there are none available, since the want of an adequate remedy at law is a condition precedent;[14] and as the creditor can only follow property upon the theory of a liability subsisting when the suit was commenced, and to which such property should respond,[15] he must state facts showing himself possessed of a specific lien upon such property,[16] or of a right to a lien thereon upon the removal of a fraudulent transfer.[17] The requisites of the statement in bills to quiet title, and to set aside fraudulent conveyances, have been already stated,[18] and the foregoing will, it is conceived, sufficiently illustrate the principles to be applied in framing that for a strict creditors' bill, the object being in the latter to set forth all facts showing the complainants' right to equitable relief, since the decree to be rendered can only be given upon the case made by the bill. Included in the statement must, of course, be a showing from the facts stated of an injury, actual or threatened, to the complainant; and this will sufficiently appear, in general, from facts which clearly show that he may lose the collection of his debt if the aid of the court is withheld.

The Prayer.

The prayer in a bill of this character must necessarily be framed in accordance with the particular object sought, asking, among other things, an accounting as to the amount of the complainant's demand, as well as of the defendant's property and effects in the case of personal estate, and an application of the same to satisfy such demand. The prayer should, as in other cases, be both general and special; and, as its special form must necessarily vary, a

[13] Kinder v. Macy, 7 Cal. 206; McGough v. Bank, 2 Ga. 151; Cox v. Dunham, 8 N. J. Eq. 594.

[14] See Lupton v. Lupton, 3 Cal. 120; Scott v. McFarland, 34 Miss. 363; Suydam v. Insurance Co., 51 Pa. St. 394; Harrison v. Hallum, 5 Cold. (Tenn.) 525. And see Swift v. Arents, 4 Cal. 390.

[15] Rives v. Walthall's Ex'rs, 38 Ala. 329.

[16] Holt v. Bancroft, 30 Ala. 193; Barrow v. Bailey, 5 Fla. 9; Conroy v. Woods, 13 Cal. 626.

[17] McCullough v. Colby, 5 Bosw. (N. Y.) 477.

[18] Ante, pp. 250, 267.

better understanding of its requisites can be obtained by an examination of accepted forms.[19]

SAME—BILLS OF INTERPLEADER.

176. A bill of interpleader is one filed by a person from whom the payment of a debt or the performance of a duty is required by two or more persons by different or separate interests, to compel such persons to interplead and state their several claims, and to obtain, upon such statement, a judgment of the court designating the person or persons to whom such payment or performance is due.

177. As its object is to relieve the complainant from a double or repeated liability for the same thing, the case must be one in which its subject is a matter of controversy between two parties, and in which the litigation between those parties will decide all their respective rights with reference to it. If a fund is involved, the money must be brought into court, or the bill must contain an offer to produce it.

178. It will not lie, in general, unless there is a privity between all parties.

179. The bill must essentially contain:

(a) A statement showing the title or right of the complainant to sue, the money or thing in controversy, and his want of personal interest in it, and his ignorance or doubt as to the nature and validity of the conflicting claims.

(b) A statement of the claims of each party defendant.

(c) The prayer for relief.

180. The bill must be accompanied by an affidavit of the complainant showing that there is no collusion between himself and the other parties to it, as it is essential that he stand indifferent between them.

[19] See ante, p. 180.

The jurisdiction of equity is frequently exercised for the protection of a person against whom conflicting claims are made by others for the same debt, duty, or thing, where he is without interest in the thing demanded beyond ascertaining who is entitled to it, in order to save him from a double or repeated liability, and prevent a multiplicity of suits.[1] To sustain a bill of this character, it is sufficient that the conflicting claims have been in fact made against the person seeking relief, without the actual commencement of any proceeding to enforce them;[2] and they may be either legal or equitable, or one legal and the other equitable,[3] provided the persons asserting them stand in privity towards each other.[4] Aside from any statute, the subject-matter in dispute must be something in which the complainant has no interest beyond ascertaining who is entitled to it.[5] It must be claimed by at least two parties by separate or different interests,[6] of whose respec-

§§ 176–180. [1] Crawford v. Fisher, 1 Hare, 436; Angell v. Hadden, 15 Ves. 244. See, also, Crawshay v. Thornton, 7 Sim. 391; Hoggart v. Cutts, Craig & P. 197, 204; Atkinson v. Manks, 1 Cow. (N. Y.) 691; Badeau v. Rogers, 2 Paige (N. Y.) 209; Burton v. Black, 32 Ga. 53; Mount Holly L. & M. Turnpike Co. v. Ferree, 17 N. J. Eq. 117; School Dist. No. 1 v. Weston, 31 Mich. 85. See Bechtel v. Sheafer, 117 Pa. St. 555, 11 Atl. 889, as to the nature of interpleader. A bill of interpleader lies only where complainant is, in good faith, and without collusion or fault, so placed that he cannot safely decide between adverse claimants of a fund or right under his control. It is only upheld upon full merits. Michigan & Ohio Plaster Co. v. White, 44 Mich. 25, 5 N. W. 1086. An appeal by complainant from a decree awarding the fund to one of the defendants is not within the rules of interpleader. Supreme Lodge, Knights of Honor, v. Nairn, 60 Mich. 44, 26 N. W. 826; Atkinson v. Flannigan, 70 Mich. 639, 38 N. W. 655.

[2] East India Co. v. Edwards, 18 Ves. 376, 377; Duke of Bolton v. Williams, 2 Ves. Jr. 138, 152; Gibson v. Goldthwaite, 7 Ala. 281; Richards v. Salter, 6 Johns. Ch. (N. Y.) 445; Newhall v. Kastens, 70 Ill. 156.

[3] Morgan v. Marsack, 2 Mer. 107; Richards v. Salter, 6 Johns. Ch. (N. Y.) 445.

[4] 2 Story, Eq. Jur. §§ 807–821. See Smith v. Target, 2 Anstr. 529; Crawshay v. Thornton, 7 Sim. 391; Jew v. Wood, 3 Beav. 579; Wallace v. Sortor, 52 Mich. 159, 17 N. W. 794; Glaser v. Priest, 29 Mo. App. 1.

[5] Langston v. Boylston, 2 Ves. Jr. 101; Slingsby v. Boulton, 1 Ves. & B. 334; Wing v. Spaulding, 64 Vt. 83, 23 Atl. 615; Lozier v. Van Saun, 3 N. J. Eq. 325; Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232; Williams v. Matthews, 47 N. J. Eq. 196, 20 Atl. 261; Sprague v. West, 127 Mass. 471. See Oppenheim v. Wolf, 3 Sandf. Ch. (N. Y.) 571.

[6] Hayes v. Johnson, 4 Ala. 267; Burton v. Black, 32 Ga. 53; Yarborough v.

tive rights the complainant is ignorant,[7] and between whom he stands indifferent;[8] and the case must be one in which the litigation between such parties will decide all their respective rights with reference to it.[9]

The remedy is one available wherever equity procedure is followed;[10] but, in those states where codes have been adopted, a simpler method has been adopted, by which, in actions on contract or for specific real or personal property, third persons claiming the debt or property from a defendant who has no interest in the subject-matter may be substituted for him.[11] The principles upon which this method rests are substantially the same as those underlying the proceeding in equity, save that, under the statutes in question, the privity essential in equity does not appear to be necessary.

Thompson, 3 Smedes & M. (Miss.) 291; Providence Bank v. Wilkinson, 4 R. I. 507. See Wallace v. Sortor, 52 Mich. 159, 17 N. W. 794. A claim to the subject-matter of the suit should, however, be a positive one. Desborough v. Harris, 5 De Gex, M. & G. 439; Jones v. Farrell, 1 De Gex & J. 208; Symes v. Magnay, 20 Beav. 47. "The filing of bills of interpleader ought not to be encouraged, and they should never be brought except in cases where the complainant can in no other way protect himself from an unjust litigation in which he has no interest." Bedell v. Hoffman, 2 Paige (N. Y.) 199, 201, per Walworth, Ch.

[7] Baltimore & O. R. Co. v. Arthur, 90 N. Y. 234; Taylor v. Satterthwaite (Com. Pl.) 22 N. Y. Supp. 187; Trigg v. Hitz, 17 Abb. Prac. (N. Y.) 436; Howe Machine Co. v. Gifford, 66 Barb. (N. Y.) 599; Morgan v. Fillmore, 18 Abb. Prac. (N. Y.) 217. See Badeau v. Rogers, 2 Paige (N. Y.) 209.

[8] Bechtel v. Sheafer, 117 Pa. St. 555, 11 Atl. 889; De Zouche v. Garrison, 140 Pa. St. 430, 21 Atl. 450; National Ins. Co. v. Pingrey, 141 Mass. 411, 6 N. E. 93; Wing v. Spaulding, 64 Vt. 83, 23 Atl. 615.

[9] Hoggart v. Cutts, 1 Craig & P. 197, 205. The parties defendant to a bill of interpleader stand before the court to litigate the question of right pending between them to the same extent as if one had brought a bill against the other, predicated upon the same matter and for the same purpose. Horton v. Baptist Church, 34 Vt. 309.

[10] Statutes providing for relief by motion in an action at law do not oust the jurisdiction of equity. See Barry v. Insurance Co., 53 N. Y. 536; Board of Education v. Scoville, 13 Kan. 17. See, also, Vosburgh v. Huntington, 15 Abb. Prac. (N. Y.) 254; Beck v. Stephani, 9 How. Prac. (N. Y.) 193.

[11] See the statutes of the different code states, which are generally alike in this regard. See, also, Dodge v. Lawson (Super. Ct.) 19 N. Y. Supp. 904.

The Statement.

The requisite facts in stating the cause of action in a bill of interpleader are well established. As it is an essential condition to the use of this remedy in equity that the complainant stand indifferent between the opposing claimants, it must appear that he is without any personal interest in the subject-matter of the suit, beyond ascertaining who is entitled to it,[12] as interest or want of interest goes to the very right of maintaining the bill.[13] He must admit and show a claim of title in each claimant,[14] as well as his ignorance or doubt as to who is entitled to call upon him for the thing in dispute,[15] and must show the real nature and character of the claims to be adjusted.[16] The latter must be specifically set forth, in order that they may appear to be of the same nature and character,[17] as the claimants must stand in privity with one another, and the bill cannot be sustained where adverse claims of different natures are asserted.[18] Thus, a tenant liable for the rent of property held by him could compel his lessor and one claiming the rent as assignee to interplead,[19] but would have no such right against a third party claiming the rent under a paramount title.[20]

[12] Langston v. Boylston, 2 Ves. Jr. 101, 107; Mitchell v. Hayne, 2 Sim. & S. 63; Aldridge v. Thompson, 2 Brown, Ch. 149; Angell v. Hadden, 15 Ves. 244; Bedell v. Hoffman, 2 Paige (N. Y.) 199; Atkinson v. Manks, 1 Cow. (N. Y.) 691; State Ins. Co. v. Gennett, 2 Tenn. Ch. 83; Wing v. Spaulding, 64 Vt. 83, 23 Atl. 615; Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232. See, also, Badeau v. Rogers, 2 Paige (N. Y.) 209; Anderson v. Wilkinson, 10 Smedes & M. (Miss.) 601.

[13] Wing v. Spaulding, 64 Vt. 83, 23 Atl. 615.

[14] Story, Eq. Pl. § 297; Wing v. Spaulding, 64 Vt. 83, 23 Atl. 615.

[15] Baltimore & O. R. Co. v. Arthur, 90 N. Y. 234; Taylor v. Satterthwaite (Com. Pl.) 22 N. Y. Supp. 187.

[16] Story, Eq. Pl. (10th Ed.) § 292. See Shaw v. Coster, 8 Paige (N. Y.) 339; Cochrane v. O'Brien, 2 Jones & L. 380.

[17] 2 Story, Eq. Jur. §§ 807–821.

[18] Dungey v. Angove, 2 Ves. Jr. 304; Smith v. Target, 2 Anstr. 529; Crawshay v. Thornton, 2 Mylne & C. 1; Jew v. Wood, 3 Beav. 579.

[19] Ketcham v. Coal Co., 88 Ind. 515. See Badeau v. Tylee, 1 Sandf. Ch. 270; Clarke v. Byne, 13 Ves. 383; Cowtan v. Williams, 9 Ves. 107; East India Co. v. Edwards, 18 Ves. 378.

[20] Dungey v. Angove, 2 Ves. Jr. 304; Johnson v. Atkinson, 3 Anstr. 798; Clarke v. Byne, 13 Ves. 383; Lowe v. Richardson, 3 Madd. 277; Snodgrass v. Butler, 54 Miss. 45; De Zouche v. Garrison, 140 Pa. St. 430, 21 Atl. 450;

Again, the complainant must show his ignorance or doubt as to the merit of the conflicting claims, without admitting a title in or liability to either separately,[21] and generally a case where he occupies the position of a mere stakeholder, requiring the interposition of the court to protect him against a double liability.[22] If the subject-matter in dispute is property, he must also show his possession, since one out of possession, or who has put one of the claimants in possession, cannot ask for an interpleader.[23]

The Prayer.

The prayer should be specific, asking that the respondents may set forth their several titles, and may interplead and settle and adjust their demands between themselves; for an injunction, if necessary to restrain them or either of them from proceeding at law; and following with the prayer for general relief. In general, the bill should offer to bring the money into court;[24] and, if an injunction is prayed for, its production will generally be required before this part of the prayer will be granted.[25]

The Affidavit.

An affidavit of the complainant is always required, in connection with the bill, that there is no collusion between himself and either of the respondents;[26] and, if the bill is filed by an officer of a corporation

Cowtan v. Williams, 9 Ves. 107; Gibson v. Goldthwaite, 7 Ala. 281; Ketcham v. Coal Co., 88 Ind. 515.

[21] Shaw v. Coster, 8 Paige (N. Y.) 339; Pfister v. Wade, 56 Cal. 43; De Zouche v. Garrison, 140 Pa. St. 430, 21 Atl. 450; National Ins. Co. v. Pingrey, 141 Mass. 411, 6 N. E. 93; Wakeman v. Kingsland, 46 N. J. Eq. 113, 18 Atl. 680.

[22] Wing v. Spaulding, 64 Vt. 83, 23 Atl. 615.

[23] See Burnett v. Anderson, 1 Mer. 405; Killian v. Ebbinghaus, 110 U. S. 568, 4 Sup. Ct. 232, 234; Stone v. Reed, 152 Mass. 179, 25 N. E. 49; Mount Holly, L. & M. Turnpike Co. v. Ferree, 17 N. J. Eq. 117.

[24] Langston v. Boylston, 2 Ves. Jr. 101, 108; Hyde v. Warren, 19 Ves. 322; Parker v. Barker, 42 N. H. 78; Shaw v. Chester, 2 Edw. Ch. (N. Y.) 405; Mohawk & H. R. Co. v. Clute, 4 Paige (N. Y.) 384. See Williams v. Wright, 20 Tex. 499.

[25] Shaw v. Chester, 2 Edw. Ch. (N. Y.) 405; Richards v. Salter, 6 Johns. Ch. (N. Y.) 445; Biggs v. Kouns, 7 Dana (Ky.) 405, 410; Fowler v. Lee, 10 Gill & J. (Md.) 358. See 2 Daniell, Ch. Pl. & Prac. (5th Ed.) 1563; Williams v. Walker, 2 Rich. Eq. (S. C.) 291, 295.

[26] Shaw v. Coster, 8 Paige (N. Y.) 339; 2 Daniell, Ch. Pl. & Prac. (6th Ed.)

on its behalf, he must accompany it with an affidavit of no collusion on his part, as well as on that of the corporation.[27]

Bills in the Nature of Bills of Interpleader.

A class of cases exists when bills of interpleader will lie by a party interested in the subject-matter to establish his own rights, where there are other conflicting claims between third persons, as where the complainant is entitled to equitable relief against the owner of property, and the legal title thereto is in dispute between two or more persons, or where a mortgagor wishes to redeem a mortgaged estate, and there are conflicting claims between third persons as to the title to the mortgage money. In these and like cases the complainant seeks relief for himself, while in a strict bill of interpleader he only asks that he may be at liberty to pay the money or deliver the property to the person entitled to it, without further liability to either claimant.[28]

SAME—BILLS OF CERTIORARI.

181. A bill of certiorari is one filed to remove a suit from an inferior to a superior court of equity, on account of some alleged incompetency of the inferior court, or some injustice in its proceedings.

182. The bill must essentially contain:

(a) A statement showing the proceedings in the inferior court, the cause of the incompetency of such court, or the injustice done or likely to be done.

(b) A prayer for the writ of certiorari.

183. The bill prays no process of subpœna, and the bill exhibited in the inferior court is treated as an original bill in the court to which it is removed, and acted upon as such.

1562; Story, Eq. Pl. (8th Ed.) § 297. The want of the affidavit renders the bill demurrable, Metcalf v. Hervey, 1 Ves. Sr. 248; Shaw v. Coster, supra; Farley v. Blood, 30 N. H. 354; Gibson v. Goldthwaite, 7 Ala. 281; Blue v. Watson, 59 Miss. 619; and so, if it is insufficient in form, Hamilton v. Marks, 5 De Gex & S. 638; Mount Holly, L. & M. Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Cobb v. Rice, 130 Mass. 231.

[27] Bignold v. Audland, 11 Sim. 24; 2 Daniell, Ch. Pl. & Prac. (6th Ed.) 1562.

[28] See Story, Eq. Pl. (10th Ed.) § 297b; Story, Eq. Jur. (13th Ed.) § 824, and cases there cited; Bedell v. Hoffman, 2 Paige (N. Y.) 199.

This form of remedy is seldom, if ever, used in this country, and will be but briefly noticed here. The above propositions sufficiently indicate its character, and what the bill must show. Its object is simply to remove the suit from the inferior to the superior court, and not to institute an independent proceeding, calling for relief, and requiring an answer. It does not pray either for an answer or for a subpœna, but only asks for a writ of certiorari to remove the cause.[1]

ORIGINAL BILLS NOT PRAYING RELIEF.

184. An original bill not praying relief is one which does not ask a decision and decree upon the whole merits of a stated case, but seeks only the aid of the court against possible future injury, or to support or defend a suit in another court of ordinary jurisdiction.

185. According to their object, they are classified as

(a) Bills to perpetuate testimony (p. 283).

(b) Bills to examine witnesses de bene esse (p. 286).

(c) Bills of discovery (p. 287).

SAME—BILLS TO PERPETUATE TESTIMONY.

186. A bill of this character is one of which the sole object is to assist other courts, and to preserve evidence to prevent future litigation.

187. The bill must essentially contain

(a) A statement showing the subject-matter affected, the title or interest of the complainant and defendant therein, the evidence to be preserved, and a necessity for perpetuating it.

(b) A prayer in accordance with the object of the bill, but not for relief.

§§ 181–183. [1] See, generally, Story, Eq. Pl. 18, 298; Daniell, Ch. Pl. & Prac. 1586; Cook v. Delebere, 3 Ch. Rep. 37; Sowton v. Clerke, 2 Ch. Rep. 57; Portington v. Tarbock, 1 Vern. 177. A bill of certiorari is distinguished from a bill of review by the fact that the former seeks to remove a cause from an inferior to a superior court, while a bill of review is brought "only to reinspect what the same court had before done." Portington v. Tarbock, Id.

188. The statement must plainly and clearly show the complainant's right or title to sue, by giving all material facts necessary to maintain the jurisdiction, including the facts of the evidence to be given and the purpose for which it is required. If relief is prayed, the bill will be dismissed, unless an amendment is allowed.

Bills to perpetuate testimony have generally fallen into disuse by reason of the general enactment of statutes which provide for the accomplishment of the same object by a simpler method.[1] When used, they are an available remedy when no present action is pending in which the facts can be investigated, or, if an action at law could be brought, when the right to bring it belongs exclusively to the other party, in order to preserve for future use the testimony of material witnesses who are in ill health, or aged, or infirm, or likely to depart from the country.[2] If an action can be brought or is pending, in which the facts in question can be investigated, a bill for this purpose cannot be maintained, the grounds for seeking the aid of equity being wanting.[3]

The Statement.

The bill must show the subject-matter as to which the desired evidence is to be given, as where testimony regarding a deed is to be preserved, by describing the deed and giving the names of the witnesses to be examined,[4] or, if regarding facts in pais, the facts to be thus established, and also the names of those who are to establish them.[5] It must also show an interest of the complainant in the subject-matter which may be endangered if the testi-

§§ 184–188. [1] In most, if not all, the states, statutory provisions provide for the taking and preservation of testimony by a summary application to a court of record for an order authorizing the taking of the depositions of witnesses upon similar grounds to those upon which the equity method is based.

[2] Story, Eq. Pl. § 303; Angell v. Angell, 1 Sim. & S. 83; Teale v. Teale, Id. 385.

[3] Story, Eq. Pl. § 303. See Angell v. Angell, 1 Sim. & S. 83; Dew v. Clarke, Id. 108; Dursley v. Fitzhardinge, 6 Ves. 251, 262.

[4] Mitf. Eq. Pl. 51, 52. See Mason v. Goodburne, Finch, 391.

[5] Knight v. Knight, 4 Madd. 1, 10.

mony in support of it is lost;[6] and this must be more than a mere expectancy, though it may be either absolute or qualified, present or remote in enjoyment, or of little value, provided it is vested and positive.[7] Again, the bill must allege a title in the defendant, real or pretended, or that he claims an interest to contest the title of the complainant in the subject-matter of the proposed testimony;[8] and it must also show a necessity for perpetuating such testimony, as that the facts in question cannot be immediately investigated in an action at law, or that an action otherwise available has been prevented by the other party, that the evidence of material witnesses is likely to be lost by their death or departure before a proper investigation can take place.[9] The allegations of the bill should, in general, be sufficiently clear to identify and describe the right sought to be supported,[10] and to show that the facts cannot be immediately investigated at law. The latter is essential, as it will be the party's own fault if, with an available remedy open to him, he does not choose to pursue it.[11]

The Prayer.

Upon principle, and in accordance with the nature and object of the bill, no relief must be prayed, but the prayer must be for leave to examine the witnesses named, to the end that their testimony may be preserved and perpetuated.[12] If equitable relief is also asked, the bill may be dismissed, unless an amendment striking out the objectionable request is allowed.[13]

[6] See Mason v. Goodburne, Finch, 391; Jerome v. Jerome, 5 Conn. 352.

[7] Story, Eq. Pl. § 301. See Allan v. Allan, 15 Ves. 135; Dursley v. Fitzhardinge, 6 Ves. 260.

[8] Mitf. Eq. Pl. 53; Dursley v. Fitzhardinge, 6 Ves. 260; ante, p. 201.

[9] Story, Eq. Pl. § 303. See North v. Gray, 1 Dickens, 14; Duke of Dorset v. Girdler, Finch, 531; Coop. Eq. Pl. 53; Mitf. Eq. Pl. 52; Mason v. Goodburne, Finch, 391.

[10] Story, Eq. Pl. §§ 303, 305. See Gell v. Hayward, 1 Vern. 312; Cressett v. Mytton, 3 Brown, Ch. 481.

[11] As to defense to a bill to perpetuate testimony, see the editor's note to section 306, Story, Eq. Pl. (9th Ed.) note 4.

[12] Story, Eq. Pl. § 306; Miller v. Sharp, 3 Rand. (Va.) 41.

[13] See Vaughan v. Fitzgerald, 1 Schoales & L. 316; Dalton v. Thomson, 1 Dickens, 97; Jerome v. Jerome, 5 Conn. 352. Cf. Commercial Mut. Ins. Co. v. McLoon, 14 Allen (Mass.) 351. A bill to cancel an insurance policy cannot

SAME—BILLS TO EXAMINE WITNESSES DE BENE ESSE.

189. A bill of this character is one filed, in aid of a pending action at law, to take the testimony of material witnesses, and preserve the same for the trial of such action.

Formerly of considerable importance, bills of this character are now seldom, if ever, used, statutory methods having been generally provided for taking and preserving evidence, in cases where it was formerly available, by the medium of depositions.[1] It was distinguished from the bill to perpetuate testimony by the fact that it could be used only in aid of an action already pending; and its object was like that of the bill mentioned,—to preserve testimony that might be otherwise lost, though only for the trial of the particular action, and not in view of litigations which might thereafter arise.[2] It is closely analogous to the bill last mentioned, and, in general,

be sustained if it also contains a demand for the perpetuation of testimony, as a bill for the perpetuation of testimony is multifarious if it also asks for relief. Aetna Life Ins. Co. v. Smith, 73 Fed. 318.

§ 189. [1] See the statutes of the different states and Rev. St. U. S. 1878, § 863.

[2] Story, Eq. Pl. §§ 307, 308. In Richter v. Jerome, 25 Fed. 679, a bill to take testimony de bene esse was maintained. The syllabus is as follows: "Where a bill praying relief had been dismissed by the circuit court upon demurrer, and the case was pending in the supreme court on appeal, with no probability of its being heard in less than two or three years, and there were aged and infirm witnesses whose testimony would be material, if the case were reversed and remanded for a hearing upon the merits, and there was no provision by law for taking their testimony, it was held that the case was a proper one for a bill to take depositions de bene esse. In such a bill the plaintiff must aver (1) that there is a suit depending in which the testimony of the witnesses named will be material; (2) that the suit is in such condition that the depositions cannot be taken in the ordinary methods prescribed by law, and that the aid of a court of equity is necessary to perpetuate the testimony; (3) the facts which the plaintiff expects to prove by the testimony of the witnesses sought to be examined, that the court may see that they are material to the controversy; (4) the necessity for taking the testimony, and the danger that it may be lost by delay. A failure to make the proper averment in any of these particulars is good ground for a demurrer, but ordinarily the allegations of the bill cannot be put in issue by an answer to any greater extent than could similar allegations in an affidavit to take depositions de bene esse."

subject to the same rules as to its form and requisites, with the additional requirement of an accompanying affidavit stating positively the circumstances by which the evidence might be lost, in order to show that no attempt to retard the trial of the pending action was contemplated.[3]

SAME—BILLS OF DISCOVERY.

190. A bill of discovery is one seeking a discovery of facts within the knowledge of the respondent, or of deeds, writings, or other things in his custody or under his control, to enable a party prosecuting or defending an action at law to obtain facts material to his case.

191. It prays no relief in consequence of such discovery, though it may ask the stay of proceedings at law until the discovery is made.

The "bill of discovery," strictly so called, was formerly in general use, as an equitable remedy to enable a plaintiff or defendant in an action at law to obtain information as to facts material to the support of his claim or defense;[1] but it is doubtful whether it can be regarded as available at the present time in this country, except in a few states, where the question has been affirmatively decided, the chief reason for its use having been removed by statutes making all parties competent witnesses, under the provisions of which answers to all pertinent questions can be compelled.[2] In some states it can no longer be used, as in Michigan and New

[3] Story, Eq. Pl. § 309. See Angell v. Angell, 1 Sim. & S. 83; Rowe v. ——, 13 Ves. 261.

§§ 190–191. [1] See Story, Eq. Pl. § 311. See Marsh v. Davison, 9 Paige (N. Y.) 580; Lane v. Stebbins, Id. 622; and the other authorities cited to the above section from Story.

[2] See Preston v. Smith, 26 Fed. 884, where Brewer, J., held that it was the general rule that bills could not be sustained solely for the sake of discovery. See, also, Rindskopf v. Platto, 29 Fed. 130; U. S. v. McLaughlin, 24 Fed. 823. But see Colgate v. Telegraph Co., 23 Fed. 82, where a bill of discovery was sustained.

York,[3] while in Alabama, Mississippi, and some other states it is still available, notwithstanding the statutes referred to.[4] The federal courts have held, in a majority of cases, that a pure bill of discovery will no longer lie; but there has been some conflict of opinion on this point, and the question is not yet wholly settled.[5] It is probable that this remedy would be but seldom resorted to at the present time in any case, in view of existing statutes, though in some instances a discovery may still be the only means by which a party can ascertain the facts necessary to his case, as where an inspection of an alleged infringing device is wanted to determine whether a patent has actually been infringed; and it may also be of the greatest importance for a complainant to know whether he can safely examine his adversary as a witness, though he has the power to compel him to testify.[6]

The Statement.

As the bill in question is of comparatively slight importance, but little need be said here as to its general structure, except that it must clearly show that it is brought by persons, for objects, and under circumstances justifying the court in entertaining it. It

[3] See Riopelle v. Doellner, 26 Mich. 102; Gelston v. Hoyt, 1 Johns. Ch. (N. Y.) 543. Before St. 1817, c. 87, the court had no jurisdiction in bills of discovery. Tirrell v. Merrill, 17 Mass. 117, 121. And under that statute they had jurisdiction in bills of discovery only in cases of trust created by deed or will. Parker, C. J., in Tirrell v. Merrill (1821) 17 Mass. 117, 121. See How. Gen. St. c. 113, § 2. Under St. 1817, c. 87, the court had no jurisdiction in cases of lost deeds, as an independent ground of chancery jurisdiction. But the plaintiff could have a discovery in such case, as incidental to a question of trust. Campbell v. Sheldon (1832) 13 Pick. (Mass.) 8, 20. Under Rev. St. c. 81, § 8, jurisdiction is given to compel a discovery as incidental to the final relief prayed for. Clapp v. Shephard (1839) 23 Pick. (Mass.) 228. Bills of discovery are abrogated by the Code of Civil Procedure and the statute giving a party the right to call his adversary as a witness and to compel the production of books and documents. Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135.

[4] See Cannon v. McNab, 48 Ala. 99; Wood v. Hudson, 96 Ala. 469, 11 South. 530; Shotwell's Adm'x v. Smith, 20 N. J. Eq. 79; Millsaps v. Pfeiffer, 44 Miss. 805; Russell v. Dickeschied, 24 W. Va. 61; and see Kendallville Refrigerator Co. v. Davis, 40 Ill. App. 616.

[5] See the cases cited under note 2, supra, and Ex parte Boyd, 105 U. S. 647. The later cases seem to be against allowing the bill.

[6] See Colgate v. Telegraph Co., 23 Fed. 82, and cases cited.

must seek a discovery of his own title, and not of that of his opponent, and must show the former's title and interest in the subject-matter as to which discovery is sought, as well as in what such title and interest consist. It must state a case which would constitute a sufficient ground for a suit or defense at law. It must generally disclose an interest of the defendant in the subject-matter, and, if the interest of the parties arises from any privity of title between them, the true nature and character of the relation; and it must state that the discovery is asked in aid of a suit pending or to be brought, and set forth particularly the matters as to which the discovery is sought.[7] The prayer may now, in America, it seems, ask for relief, as well as discovery.[8]

BILLS NOT ORIGINAL—DEFINITION AND CLASSIFICATION

192. Bills not original are those which relate to some matter already litigated in court between the same parties, and are properly divisible, according to their nature and the objects which they contemplate, into two general classes:

(a) Interlocutory bills (p. 290).

(b) Bills in the nature of original bills (p. 303).

[7] Story, Eq. Pl. §§ 313–325; Walmsley v. Child, 1 Ves. Sr. 341, 345; Whitfield v. Fausset, 1 Ves. Sr. 387, 392; Findlay v. Hinde, 1 Pet. 241. Generally, the court will not compel a discovery, unless it can be used for some beneficial purpose. Chapin v. Coleman (1831) 11 Pick. (Mass.) 331, 337. A bill for discovery must aver that a suit at law has been or is about to be brought, in which the discovery sought is material. Pease v. Pease (1844) 8 Metc. (Mass.) 395; Haskins v. Burr (1870) 106 Mass. 48. Where a bill seeks discovery in aid of proceedings at law, complainant must charge in his bill that the facts are known to defendant and ought to be disclosed to him, and that the complainant is unable to prove them by other evidence, and it must be affirmatively stated in the bill that the facts sought to be discovered are material. Carroll v. Bank, Har. (Mich.) 197. A person is not a proper party defendant to a bill for discovery in aid of a defense to an action at law where he may be called as a witness at the trial. Yates v. Monroe, 13 Ill. 212.

[8] See Story, Eq. Pl. §§ 312, 313, and cases cited; post, pp. 384, 385, 450; Keene's Appeal, 60 Pa. St. 504; McIntyre v. Mancius, 3 Johns. Ch. (N. Y.) 45, and the cases cited in Story, Eq. Pl. §§ 319–325. A bill for discovery only cannot be set down for final hearing. Townsend v. Odam, Walk. (Miss.) 357. See, also, post, p. 480.

SAME—INTERLOCUTORY BILLS.

193. Interlocutory bills are bills whose object is to add to an original bill by correcting defects or supplying matters necessary to the suit; or to continue the suit if abated, and obtain the benefit of proceedings already had; or for both purposes.

194. Interlocutory bills fall naturally into three classes:

(a) Supplemental bills and original bills in the nature of supplemental bills (p. 290).

(b) Bills of revivor and original bills in the nature of bills of revivor (p. 297).

(c) Bills of revivor and supplement (p. 301).

195. SUPPLEMENTAL BILLS—A supplemental bill is one filed in addition to an original bill, to remedy or supply some defect or omission in its original frame or structure, or to introduce matters happening since the commencement of the suit, material to and supporting the original bill, which do not change the rights or interest of those already before the court.

196. Supplemental bills may be filed after a decree as well as before, but they are not the appropriate remedy where their object can properly be accomplished by an amendment, nor will they generally be sustained where the plaintiff, with full knowledge of defects to be remedied or matters to be supplied, allows the time for amendment to pass without applying therefor, or is otherwise guilty of unreasonable delay.

197. The bill must essentially contain

(a) A statement of facts showing proper grounds for its use, due diligence in filing it, and an actual or threatened injury to the complainant by reason of the failure of the original bill to conform to actual facts.

(b) A prayer in accordance with the object of the bill.

198. If the bill rests upon matters occurring subsequent to the filing of the original bill, such matters must be set forth, as well as the relation of the parties thereby affected; but the case made by the original bill need not be set forth except where a new party is brought in, when enough must be alleged to show an equity against such party.

A "supplemental bill," strictly so called, is what its name implies,—a bill supplementing or supporting and adding to an original bill already filed, when by reason of a defect or omission in the latter, either by mistake in the statement of the cause of action or in the prayer, or the omission of a material fact or the name of one who is a necessary party, or by reason of the occurrence of events since the institution of the suit which change or affect the relative rights of the parties to such suit, the latter cannot be safely proceeded with until the defect or omission is corrected or supplied, or the parties placed in accord with present conditions.[1] Owing to the present liberality of courts with regard to amendments, it is somewhat difficult to determine how far this form of remedy is now available, since it will not generally be permitted where an amendment will accomplish the same object.[2]

§§ 192–198. [1] See Hind, Prac. 42–45; Story, Eq. Pl. (9th Ed.) § 332 et seq.; Veazie v. Williams, 8 Story, 54, Fed. Cas. No. 16,906; Dodge v. Dodge, 29 N. H. 177; Stafford v. Howlett, 1 Paige (N. Y.) 200. To warrant the filing of such bill, it should be shown to the court either that the matter relied on as supplemental has arisen since the commencement of the original suit, or that the plaintiff had available notice thereof when it was too late to amend, or that he has been prevented from availing himself of the same at an earlier stage of the cause, through inadvertence, misapprehension on the part of himself or his agents or counsel, or by some other cause satisfactorily shown. Pedrick v. White (1840) 1 Metc. (Mass.) 76. Although a bill is styled therein as a supplemental bill, and refers to prior proceedings and decrees, as facts on which to ground the claim for relief, if not praying a revision of any prior decree, it is not a supplemental, but an original, bill. Brooks v. Brooke, 12 Gill & J. (Md.) 306.

[2] Story, Eq. Pl. (10th Ed.) § 333; Murray v. King, 5 Ired. Eq. (N. C.) 223; Stafford v. Howlett, 1 Paige (N. Y.) 200. If the facts in question were known in time to have been presented by way of amendment, it will be sufficient to defeat a supplemental bill. Mosgrove v. Kountze, 14 Fed. 315. See, also,

Its use has been always limited by the rule that, if the facts relied upon were known to the party in time to have applied for an amendment, the bill cannot be sustained;[3] and it is ground for demurrer if such facts appear upon its face.[4] The principal cases for its use have been those of defects or omissions not discovered until the time for correcting them by amendment had passed, such as mistakes in material facts;[5] or where events had occurred since the institution of the original suit, creating new rights or relations, and thus calling for the introduction of new matter in the original bill,[6] when such matter referred to and supported the latter, without changing the rights or interests of those already before the court;[7] or to correct or support the prayer of the bill;[8] or to add the name of a necessary party.[9] It seems that the bill may still be used for any of these purposes if the case is one where the defect or omis-

Stafford v. Howlett, 1 Paige (N. Y.) 200; Walker v. Gilbert, 7 Smedes & M. (Miss.) 456; Henry v. Insurance Co., 45 Fed. 299; Mitf. Eq. Pl. (by Jeremy) 207, 290, 324–326; Story, Eq. Pl. (10th Ed.) § 885. An exception to the rule as to introducing such matter has been made where a foreign executor, filing a bill in a state other than that where he was appointed, takes out letters testamentary in the latter after the suit is brought, the fact of the granting of such letters being allowed as an amendment. Buck v. Buck, 11 Paige (N. Y.) 170. See 1 Barb. Ch. Prac. 207. Facts of which complainant has learned since filing his bill, but which occurred before, are not matter for a supplemental bill, but for an amendment. Wood v. Truax, 39 Mich. 628.

[3] Story, Eq. Pl. (10th Ed.) §§ 333, 336.

[4] Post, c. 6, p. 359.

[5] Story, Eq. Pl. § 333. See Veazie v. Williams, 3 Story, 54, Fed. Cas. No. 16,906.

[6] A supplemental bill is necessary to bring before the court facts which have transpired subsequent to the filing of the original bill. Hammond v. Place, Har. (Mich.) 438. When any event happens, subsequently to filing an original bill, which gives a new interest or right to a party, it should be set out in a supplemental bill. Saunders v. Frost (1827) 5 Pick. (Mass.) 275. Equity rule 57, which provides for granting leave to file a supplemental bill, or bill in the nature of a supplemental bill, where the suit has become defective by reason of a change of interest, etc., is to be construed as applying to the case of a transfer of the cause of action by voluntary deed or contract, as well as by operation of law. Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co., 72 Fed. 325.

[7] Story, Eq. Pl. § 336.

[8] Story, Eq. Pl. § 336. See Pinkus v. Peters, 5 Beav. 253.

[9] Story, Eq. Pl. § 335; Jones v. Jones, 3 Atk. 110.

sion is not discovered, or the new matter to be supplied is not known, until too late for an amendment, especially where principal questions at issue have been decided, and it is necessary to bring in new matters or additional parties in order to carry the decision into effect, as the bill, though not without leave of court, may be filed as well after decree as before.[10] Its use, however, is subject to certain important restrictions beyond what has been stated. It will not as a rule be allowed when the matter alleged could not, under any circumstances, have been introduced as an amendment to the original bill;[11] nor where it seeks to make a new case by introducing matters which do not refer to and support the original statement;[12] nor to supply a cause of action, though upon the same state of facts, when the original bill discloses none;[13] and it must always be filed without unnecessary delay when the occasion for its use is discovered,[14] and, if new matter is to be introduced, it should be more than merely corroborative of that originally stated.[15] When properly filed, it becomes part of the original bill, and the whole is taken as one amended bill;[16] but, when new parties are thus brought in, it becomes, as to them, a new suit.[17]

[10] See Story, Eq. Pl. § 333; Jenkins v. Eldredge, 3 Story, 299, Fed. Cas. No. 7,267; Tappan v. Evans, 12 N. H. 330.

[11] That is, when the new matter sought to be interjected is wholly foreign to the complainant's original case, and inconsistent with the belief prayed for. See Stafford v. Howlett, 1 Paige (N. Y.) 200; Chouteau v. Rice, 1 Minn. 106 (Gil. 83); Maynard v. Green, 30 Fed. 643. See, also, Leonard v. Cook (N. J. Ch.) 21 Atl. 47.

[12] Stafford v. Howlett, 1 Paige (N. Y.) 200; Maynard v. Green, 30 Fed. 643.

[13] A complainant who had no cause of action at the filing of his original bill cannot maintain a supplemental bill on a cause of action that accrued thereafter. Neubert v. Massman, 36 Fla. 91, 19 South. 625; Heffron v. Knickerbocker, 57 Ill. App. 339. A defective bill, affording no ground for proceeding, cannot be sustained by filing a supplemental bill, founded on matters taking place after the filing of the original. Putney v. Whitmire, 66 Fed. 385.

[14] Story, Eq. Pl. § 338a. See Miller v. Clark, 49 Fed. 695; Woodruff's Ex'rs v. Brugh, 6 N. J. Eq. 465.

[15] See Jenkins v. Eldredge, 3 Story. 299, Fed. Cas. No. 7,267.

[16] See Bowie v. Minter, 2 Ala. 406; Potier v. Barclay, 15 Ala. 439.

[17] In such case it seems that the original defendants need not be made parties to the supplemental bill, unless having an interest in the new matter thereby

The Statement.

The former rule governing the statement in bills of this class was that the original bill and the proceedings thereon should be recited; and, if the supplemental bill was occasioned by an event subsequent to the original bill, it must state such event and the consequent alteration with respect to the parties;[18] but in modern practice it is only necessary, unless the special circumstances of the case require otherwise, to set forth the supplemental matter upon which the bill is founded.[19] Where a new party is brought in, as the bill stands as a new suit as to him, enough of the statements of the original bill or answer must be given to show an equity against him;[20] and this may be done by alleging that such matters were set forth in such bill or answer, without alleging them positively as in an original pleading.[21] The supplemental matter must, however, be clearly stated, under the principles governing all allegations of fact in equity pleading; and the facts stated must appear to be material to and support the original controversy, as the bill will not be allowed if it makes a case having no near relation to or natural connection with the original cause of action,[22] or inconsistent with it.[23] In accordance with the above, if the supplemental bill is filed to perpetuate testimony upon new facts discovered since the filing of the original bill, it must state what such facts are.[24]

presented. See Story, Eq. Pl. § 343; Bignall v. Atkins, 6 Madd. 369; Ensworth v. Lambert, 4 Johns. Ch. (N. Y.) 605.

[18] Story, Eq. Pl. (10th Ed.) § 343.

[19] Eq. Rule 58 provides that "it shall not be necessary in any supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case require it"; but it has been held in New York that a full statement will not render the bill demurrable. Johnson v. Snyder, 7 How. Prac. (N. Y.) 395. See the explanation of Bellows, J., in Chase v. Searles, 45 N. H. 511.

[20] Vigers v. Lord Audley, 9 Sim. 72.

[21] See Vigers v. Lord Audley, 9 Sim. 72; Lloyd v. Johnes, 9 Ves. 37; Baldwin v. Mackown, 3 Atk. 817; Edgar v. Clevenger, 3 N. J. Eq. 464.

[22] Minnesota Co. v. St. Paul Co., 6 Wall. 742; Maynard v. Green, 30 Fed. 643; Ledwith v. City of Jacksonville, 32 Fla. 1, 13 South. 454, 455. Cf. Jenkins v. Bank, 111 Ill. 462; Gage v. Parker, 103 Ill. 528; Grabenheimer v. Blum, 63 Tex. 369.

[23] Straughan v. Hallwood, 30 W. Va. 274, 4 S. E. 394; Maynard v. Green,

[24] Knight v. Knight, 4 Madd. 1.

The Prayer.

This must be in accordance with the object of the bill, and generally that all the persons made respondent appear and answer the charges it contains;[25] but the relief sought must be a modification or enlargement of that originally asked for.[26]

Original Bills in the Nature of Supplemental Bills.

"Supplemental bills," strictly so called, are properly applicable only to cases where the same parties or the same interests remain before the court;[27] but where events happening since the institution of the suit have given a new interest in the matter in dispute to any person not a party to the original bill, as where a third party becomes, pendente lite, the assignee of the interest of a party to the suit,[28] a form of remedy is available, designated as above, which, while really supplemental as to old parties and old interests, is original as to the new party and his interest.[29] By this means, where the interest of an original party has entirely determined, and another person has become interested in the subject-matter by a title not derived from the other, such person may obtain the benefit of the proceedings already had, without being put to the expense of commencing a separate suit on his own account.[30] This form of bill is often confounded with the supplemental bill proper, and indeed the chief distinction between them seems to be that the latter is properly applicable only to cases where the same parties and interests are affected, while the former is available where new parties are brought in, having new interests, arising

30 Fed. 643; Leonard v. Cook (N. J. Ch.) 21 Atl. 47. See Sanderlin v. Thompson, 2 Dev. Eq. (N. C.) 539.

[25] See Story, Eq. Pl. (10th Ed.) 343; Chase v. Searles, 45 N. H. 511. But no subpœna is necessary, unless new parties are brought in. See Shaw v. Bill, 95 U. S. 10.

[26] See Story, Eq. Pl. § 333; Maynard v. Green, 30 Fed. 643.

[27] Ante, p. 292.

[28] Foster v. Deacon, 6 Madd. 59; Wellesley v. Wellesley, 17 Sim. 59; Mole v. Smith, 1 Jac. & W. 665; Bowie v. Minter, 2 Ala. 406.

[29] See Story, Eq. Pl. § 346; Mitf. Eq. Pl. 63; Russell v. Sharp, 1 Ves. & B. 500; Randall v. Mumford, 18 Ves. 424; Sedgwick v. Cleveland, 7 Paige (N. Y.) 287.

[30] See Story, Eq. Pl. § 350, and note 1; Foster v. Deacon, 6 Madd. 59. And see Campbell v. City of New York, 35 Fed. 14; Tappan v. Smith, 5 Biss. 73, Fed. Cas. No. 13,748; New Jersey Zinc Co. v. New Jersey Franklinite Co., 13 N. J. Eq. 322, 332; Ross v. City of Ft. Wayne, 58 Fed. 404.

from facts occurring since the filing of the original bill.[31] In any case, if any of the original parties remain, the bill is really supplemental as to them; but, as it brings in parties and interests not previously before the court, it is not strictly an addition to the original bill, but an original bill itself, especially where the entire interest of a sole complainant or respondent has passed to the new party, though in its consequences obtaining the benefit of the proceedings on the former bill.[32] In the case of an assignment of the entire interest of a sole complainant or respondent, as the interest of either in the suit would thereby determine, neither could thereafter prosecute or defend, and a mere supplemental bill would be improper.[33]

The Supplemental Complaint or Petition in Equitable Suits under the Codes.

The various practice acts of the code states allow supplemental pleadings by both parties, upon leave of court; and though the liberal rule of equity procedure is somewhat restricted, and the circumstances under which such pleadings are permitted are not in all cases the same, the general principles upon which the equitable remedy is based are still applicable, where not modified or changed by the particular statute.[34] The office of the supplemental complaint or petition under the different acts is to bring into the case new facts, so that the court may render its final judgment upon the actual facts existing at the time, and not to supply those which, though necessary to the maintenance of the action, existed at the time of, but were omitted from, the original statement. Its use, therefore, is more restricted than that of the supplemental bill in equity, and, like the latter, it is not a substitute for the original complaint; nor can it set up a new cause of action, nor advance any matters which do not refer to and support the original statement, nor be filed without leave of court first obtained.[35]

[31] Coop. Eq. Pl. 75, 76.

[32] Mitf. Eq. Pl. 63.

[33] Fulton v. Greacen, 44 N. J. Eq. 444, 15 Atl. 827.

[34] See Bliss, Code Pl. (3d Ed.) § 432.

[35] See Dillman v. Dillman, 90 Ind. 585; Gibbon v. Dougherty, 10 Ohio St. 365; Bliss, Code Pl. (3d Ed.) §§ 432, 433.

199. BILLS OF REVIVOR—A bill of revivor is one brought to revive and continue the proceedings upon an original bill, where, by reason of the death of one of the parties or the marriage of a female plaintiff, the suit is abated before its final consummation.

200. An abatement, in equity, signifies only a present suspension of all proceedings in the suit, because there are no parties before the court capable of proceeding therein, and not, as at common law, a termination of the particular action.

201. The bill is an available remedy whenever the interest of the former party survives, and is transmitted to one whose title as his representative cannot be disputed; and the only question to be determined is the fact of the existence of such representative. If the title of the latter is open to contest, the remedy is by an original bill in the nature of a bill of revivor.

202. It may generally be brought by the complainant or his representatives, or by one or more of several remaining complainants, but not by a defendant or his representatives, unless the interest of such defendant in a continuance of the proceedings has been previously established by a decree.

203. The bill must essentially contain:

(a) A statement of facts showing proper grounds for its use, and an actual or threatened injury resulting from the abatement.

(b) A prayer in accordance with the object of the bill.

204. As the object of the bill is to bring before the court the proper representatives of the former party, and thus obtain the benefit of proceedings already had, the facts stated must clearly show a title to revive, as well as that such representatives exist, or the

bill will be demurrable. The prayer will depend upon the particular circumstances of the case, and may ask for an answer to the original bill under proper circumstances.

At common law, the abatement of an action put an end to it; but the term has a different meaning in equity, signifying only a suspension or interruption of a suit for want of proper parties to proceed until such parties are brought before the court.[1] The most common and perhaps the sole causes of the abatement of a suit in equity are the death or marriage of one of the original parties;[2] but the result will not necessarily follow from either fact if the interest of the party in question is thereby determined,[3] or if, though surviving, it passes to one or more of those remaining, so that the whole interest is before the court, and capable of a proper adjudication,[4] or if those remaining before the court, as in the case of several creditors, suing on behalf of themselves and other creditors, are competent to call upon the court for its decree.[5] Where the interest of the party survives, and passes to his legal or personal representatives, and the case is one where those remaining are not in a position to proceed by themselves, a bill of revivor may be maintained by or against such representatives to revive and continue the suit, bringing the proper parties be-

§§ 199–204. [1] Story, Eq. Pl. § 354. Equity Rule Sup. Ct. D. C. No. 48 provides for a revival of suits by bill of revival, which may be filed "at any time." Rule No. 118 provides that the revival of suits on "motion" shall be filed within a year. Held, that a bill of revival could be filed at any time within the ordinary periods of limitation. Young v. Kelly, 3 App. D. C. 296. A bill which is in substance one to revive and carry into effect a former decree, and which contains proper allegations for that purpose, can be entertained by a court of equity, whether properly or not styled a bill of revivor and supplement. Shainwald v. Lewis, 69 Fed. 487. Where a decree has been made reviving a former decree, a second bill for the same purpose properly seeks to revive the first decree of revivor, and so ipso facto the original decree. Shainwald v. Lewis, 69 Fed. 487.

[2] Story, Eq. Pl. § 354.

[3] Mitf. Eq. Pl. 58.

[4] See Masters v. Barnes, 7 Jur. 1167, 1168. See Buchanan v. Malins, 11 Beav. 52; Fallowes v. Williamson, 11 Ves. 306. See, also, Boddy v. Kent, 1 Mer. 361, 364; Wright v. Dorset, 3 Ch. Rep. 66; Preston v. Fitch, 137 N. Y. 41, 56, 33 N. E. 77, 81.

[5] Mitf. Eq. Pl. 58, 59.

fore the court,[6] though the remedy is only available to the representatives of a party defendant, after a decree establishing his interest in the further continuance of the proceedings.[7] In any case there can ordinarily be no revival of a suit which has been abated by the death of an original party, save by one who is a privy or representative, such as are heirs or devisees in relation to real estate, or an executor or administrator in relation to personalty.[8] The remedy is still in use, though a more simple remedy is in use, by allowing the suggestion of the death of a party, upon which the suit proceeds. It has been held, however, that the latter is a concurrent remedy only, the chancery method of proceeding by bill of revivor being still available at the option of the party.[9]

The Statement.

The modern frame of a bill of revivor, like that of a supplemental bill, is more simple than under the former practice; and it is not now generally necessary to state more than the filing of the original bill, the proceedings thereon, and the abatement, without setting forth the statements of the original bill, unless the special circumstances of the case require it.[10] In brief, there must be enough to justify and explain the prayer of the bill of revivor, and to show the complainant's title to sue; and the bill should also charge that the cause ought to be revived, and to stand in the same condition with respect to the parties to the original bill as at the time of the abatement.[11]

[6] See Coop. Eq. Pl. 71, and cases cited; Mitf. Eq. Pl. 78; Johnson v. Peck, 2 Ves. Sr. 465; Welch v. Louis, 31 Ill. 446. A bill of review is not the commencement of a new suit, but the continuation of an old one. Clarke v. Mathewson, 12 Pet. 164. And see Dixon v. Wyatt, 4 Madd. 392; Burney v. Morgan, 1 Sim. & S. 358; Slack v. Walcott, 3 Mason, 508, Fed. Cas. No. 12,932; Ross v. Hatfield, 2 N. J. Eq. 363; Floyd v. Ritter's Adm'r, 65 Ala. 501.

[7] Story, Eq. Pl. § 373. See, also, Williams v. Cooke, 10 Ves. 406; Souillard v. Dias, 9 Paige (N. Y.) 393; Benson v. Wolverton, 16 N. J. Eq. 110; Peer v. Cookerow, 13 N. J. Eq. 136; Reid v. Stuart, 20 W. Va. 382.

[8] See Fost. Fed. Prac. (2d Ed.) § 177; Story, Eq. Pl. § 379.

[9] Foster v. Burem, 1 Heisk. (Tenn.) 783; Carter v. Jennings, 24 Ohio St. 182; Floyd v. Ritter's Adm'r, 65 Ala. 501.

[10] Story, Eq. Pl. § 374; Phelps v. Sproule, 4 Sim. 318; Vigers v. Lord Audley, 9 Sim. 72; Douglass v. Sherman, 2 Paige (N. Y.) 358.

[11] U. S. Eq. Rule 58; Story, Eq. Pl. § 374. Upon a bill of revivor, the sole questions before the court are the competency of the parties and the correctness of the frame of the bill. Bettes v. Dana, 2 Sumn. 383, Fed. Cas. No. 1,368.

The Prayer.

This will vary according to the circumstances of the case, but should always pray that the suit be revived, according to the facts stated; and if it is sought to substitute the representatives of a defendant who has died without answering either the original bill or an amendment, or whose answer, if made, has been excepted to, an answer by them should be prayed, though the bill in itself strictly requires no answer.[12]

Original Bills in the Nature of Bills of Revivor.

As a strict bill of revivor depends upon a privity of representation by operation of law, the only fact to be ascertained is whether the party to be brought in has the character imputed to him, the revival of the suit following as a matter of course upon the establishment of that fact.[13] But where the transmission of interest is such that other facts are presented for determination, as when the title to such interest or the person entitled to it may be litigated, the case becomes one similar to that where original questions must be decided upon supplemental matter; and the simpler remedy is replaced by an original bill in the nature of a bill of revivor, dependent upon privity of estate or title by the act of the party, and under which the nature and extent of the whole act by which the privity of estate or title is created is open to controversy.[14] Thus, while an heir, executor, or administrator would be brought in by a simple bill of revivor, a devisee under a will, or a new trustee appointed upon the death or resignation of one originally acting, would not stand in privity of representation, but would hold under a title open to controversy, and which must be established before making either a party.[15] The essential distinction between the two forms is thus the want of the privity of representation between the party deceased or incapacitated and him

[12] See Coop. Eq. Pl. 70, 71; Story, Eq. Pl. § 375; Mitf. Eq. Pl. 76, 77, and cases cited.

[13] Story, Eq. Pl. § 379.

[14] See Slack v. Walcott, 3 Mason, 508, Fed. Cas. No. 12,932; Clare v. Wordell, 2 Vern. 548; Jones v. Jones, 3 Atk. 217; Douglass v. Sherman, 2 Paige (N. Y.) 358; Mitf. Eq. Pl. 71, 97.

[15] See Coop. Eq. Pl. 63, 69, 77; Douglass v. Sherman, 2 Paige (N. Y.) 358; Attorney General v. Foster, 2 Hare, 81.

to whom such interest is transmitted; but, the fact of interest or title in the latter being established, he stands in the same position as if it had originally existed, and is both bound by and entitled to the advantage of the proceedings on the original bill.[16] Privity of some sort must exist, however, between the person bringing either a bill in the nature of a bill of revivor or supplement and the complainant in the original bill, as the object is always to obtain the benefit of the proceedings in the original suit, and one claiming under an independent title cannot be so benefited.[17]

The Statement.

The facts to be stated in a bill of this character are generally the same as in a simple bill of revivor, including the manner in which the interest of the original party has been transmitted, a charge that such transmission was valid, and the rights resulting therefrom.[18]

The Prayer.

The form of the prayer is the same as in a bill of revivor, asking that the suit be revived, and that the complainant have the benefit of all former proceedings therein.[19]

205. BILLS OF REVIVOR AND SUPPLEMENT—A bill of revivor and supplement is one brought both to revive and continue a suit which has been abated, and also to present to the court matters necessary to show the right of the parties, or to obtain the full benefit of the suit, where some fact or occurrence, aside from the event causing the abatement, renders it necessary to determine questions beyond the mere fact as to by or against whom the cause is to be revived.

[16] Mitf. Eq. Pl. 97, 98. See Clare v. Wordell, 2 Vern. 548; Mordaunt v. Minshall, 6 Brown, Parl. Cas. 32; Phelps v. Sproule, 4 Sim. 318.

[17] Story, Eq. Pl. § 385; Oldham v. Eboral, 1 Coop. t. Brough. 27; Rylands v. Latouche, 2 Bligh, 566.

[18] Story, Eq. Pl. § 386; Phelps v. Sproule, 4 Sim. 318.

[19] Story, Eq. Pl. § 386. For the form of a bill of this character, see Van Heyth. Eq. Drafts, 348.

206. As it is in effect a supplemental bill, added to a bill of revivor, it must in its separate parts be framed and proceeded upon in the same manner as the bills named.

As its name implied, this is simply a compound of the two preceding classes of bills, containing the essential requisites of both, and proceeded upon in the same manner. It is available where an abatement of the suit has taken place, necessitating its revival before further proceedings can be had, and where supplemental matter has also arisen affecting the rights of the parties, which should properly be shown to the court, either to define such rights or to obtain the full benefit of the suit.[1]

Original Bills in the Nature of Revivor and Supplement.

A further class of bills is recognized under this head, though it seems hardly necessary to enter into any explanation regarding them, as they are compounded from the two classes of original bills in the nature of revivor, and of supplement, which have been already considered. The occasion for their use seems to arise in a case where, for instance, a complainant, pending the suit, conveys his interest, and dies; and either the purchaser or defendant must bring a bill of this character in order to revive and continue the suit,—the purchaser, who would be the new party to be brought in, holding by a title open to contest, and the fact of his thus becoming a necessary party after the commencement of the suit calling for the addition of a bill of the supplemental kind to that for revivor, and the proceeding being an original one as to him.[2]

§§ 205–206. [1] Story, Eq. Pl. § 387; Coop. Eq. Pl. 84. See Merrywether v. Mellish, 13 Ves. 161; Bampton v. Birchall, 1 Phil. Ch. 568; Pendleton v. Fay, 3 Paige (N. Y.) 204; Westcott v. Cady, 5 Johns. Ch. (N. Y.) 342; Ross v. Hatfield, 2 N. J. Eq. 363; Webster v. Hitchcock, 11 Mich. 63; Eastman v. Batchelder, 36 N. H. 141.

[2] 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1545, 1546. And see Brady v. McCosker, 1 N. Y. 217; Lyons v. Van Riper, 26 N. J. Eq. 337.

SAME—BILLS IN THE NATURE OF ORIGINAL BILLS.

207. Bills in the nature of original bills are bills for the purpose of cross litigation, or to controvert, suspend, reverse, or carry into effect a decree or order of court already made.

208. Bills in the nature of original bills are of the following kinds:

(a) Cross bills (p. 303).

(b) Bills of review and bills in the nature of bills of review (p. 309).

(c) Bills to impeach decrees for fraud (p. 316).

(d) Bills to suspend or avoid the operation of decrees (p. 317).

(e) Bills to carry decrees into execution (p. 318).

Bills in the nature of original bills are treated in most of the older text-books as a class co-ordinate with "Original Bills" and "Bills not Original." It has been thought best, however, in this work, to place this class of bills under the general head of "Bills not Original," since they always relate to a bill already filed, though in a proceeding of an independent character, and since the division of bills into the two classes of "Original Bills" and "Bills not Original" is necessarily exhaustive. Original bills in the nature of bills of revivor, or supplement, or of both, which have been already noticed, are also of this character and belong to this class, but it has been deemed best to consider them in connection with the interlocutory bills to which they are properly allied.

209. CROSS BILLS—A cross bill is one filed by a defendant in a pending suit, against a complainant or the remaining defendants in the same suit, or against both, touching the matters stated in the original bill.

210. It may be filed without leave of court, and the court may direct its filing in a proper case; and as it is treated as an auxiliary suit, or a dependency of the original suit, it can only be sustained upon matters

growing out of the original bill. It is generally necessary where the defendant seeks affirmative relief.

211. Its object is usually either

(a) To obtain a discovery of facts necessary to a proper determination of the suit;

(b) To obtain full relief for all parties;

(c) To bring before the court new matter in aid of the defense to the original bill; or

(d) To obtain some affirmative relief touching the matters in the original bill.

212. In general, it may be used to shape or modify the relief sought by the complainant, so as to obtain full relief for all parties in interest.

213. The bill must essentially contain

(a) A statement showing proper grounds for its use.

(b) A prayer in accordance with its object.

214. The statement must include, in addition to the parties, prayer, and objects of the original bill, and the rights of the parties to be affected, all facts necessary to justify the relief sought, since a cross bill must be complete in itself, and cannot rely upon the original bill for such statement; and the matters thus set up must not be such as are equally available by way of answer.

The cross bill fills an important place in equity pleading, though its use is now largely modified and regulated by rules of court or statutes; and for the reason that it is a complete bill in equity, containing both a statement of facts and a prayer for relief, it is considered here in that character, though available only to a defendant as a method of defense, and depending, like other interlocutory bills, upon an original bill already filed.[1] It can ordinarily be brought only by a de-

§§ 209–214. [1] See Story, Eq. Pl. §§ 389–402; 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1548. A cross bill is a mode of defense, and is dependent upon the original bill, forming with it but one suit, and, although its allegations must

fendant in an original suit,[2] though it seems that one claiming as a purchaser from such party may maintain a bill in the nature of a cross bill for certain purposes;[3] and its use is limited by the important restrictions that it must be complete in itself,[4] must not state matters which can equally well be set up by answer,[5] and must relate only to

relate to the subject-matter, it is not restricted to the issues of the original bill. Nelson v. Dunn, 15 Ala. 501.

[2] See Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106; Merwin v. Richardson, 52 Conn. 225. And see Payne v. Cowan, Smedes & M. Ch. (Miss.) 26; Renfro v. Goetter, 78 Ala. 311. Parties brought in as defendants to a cross bill may, in turn, exhibit cross bills, when the same are necessary or proper to terminate the litigation. Blair v. Steel Co., 159 Ill. 350, 42 N. E. 895. Under the practice of the federal courts, one claiming an interest in the subject of litigation cannot properly be made a party defendant against the objection of complainant, and hence a cross bill filed by a person thus coming into the cause should be dismissed. Gregory v. Pike, 15 C. C. A. 33, 67 Fed. 837. An appellate court may, however, treat such cross bill as a summary petition filed by the party himself pro interesse suo, and on that theory affirm a decree entered in his favor upon the cross bill. Gregory v. Pike, 15 C. C. A. 33, 67 Fed. 837.

[3] Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106.

[4] See Ewing v. Patterson, 35 Ind. 326; Washington R. R. v. Bradleys, 10 Wall. 299; Campbell v. Routt, 42 Ind. 410. Though an answer asks to be taken as a cross bill, it cannot be so treated, no cost bond being given. Cumberland Land Co. v. Canter Lumber Co. (Tenn. Ch. App.) 35 S. W. 886. An answer cannot be deemed a cross bill because it contains a request that it be so taken. Ballance v. Underhill, 3 Scam. (Ill.) 453. Followed by Purdy v. Henslee, 97 Ill. 389; Parke v. Brown, 12 Ill. App. 291. It is, however, not necessary that the cross bill should be on a separate paper. The answer being complete, the complainant may state new matter making a title to affirmative relief, and pray in conclusion for the relief sought. Thielman v. Carr, 75 Ill. 385. But if so drawn, to be sufficient it must be sufficient to constitute a cross bill if disconnected, and a proper heading attached. Purdy v. Henslee, 97 Ill. 389. It is the duty of a party who files a cross bill to take steps to have it answered. Reed v. Kemp, 16 Ill. 445. Followed by Purdy v. Henslee, 97 Ill. 389.

[5] Weed v. Smull, 3 Sandf. Ch. (N. Y.) 273; Glenn v. Clark, 53 Md. 580; Krueger v. Ferry, 41 N. J. Eq. 432, 5 Atl. 452; Wing v. Goodman, 75 Ill. 159; Bullock v. Brown, 20 Ga. 472. A cross bill seeking no discovery, and setting up no defense which might not as well have been taken by answer, will be dismissed. American & General Mortg. & Inv. Corp. v. Marquam, 62 Fed. 960. A cross bill setting up only such matter as is already properly set up in the answer is improper, and may be dismissed upon motion. Akin v. Cassiday, 105 Ill. 22. But see Dickey, J., dissenting. Cf. Morgan v. Smith, 11 Ill. 194.

such matters as are maintained in or grow out of those stated in the original bill.[6] Its objects are usually those stated above, and its use is generally imperative, if a defendant seeks affirmative relief,[7] though in special cases the same object has been accomplished by a decree in favor of the complainant, conditioned upon the allowance of the defendant's claim.[8] It is particularly necessary where any question arises between two defendants to an original bill; and the court cannot make a complete decree until such question, as well as every other matter in dispute, is brought before it by the proper parties.[9]

A cross bill is improper where the defendant, by requiring the complainant to file a proper bill, and specifically answering it, could obtain all the relief he seeks. Prichard v. Littlejohn, 128 Ill. 123, 21 N. E. 10.

[6] Andrews v. Hobson's Adm'r, 23 Ala. 219; Hornor v. Hanks, 22 Ark. 572; Andrews v. Kibbee, 12 Mich. 94; Town of Rutland v. Paige, 24 Vt. 181; Ex parte Railroad Co., 95 U. S. 221; Krueger v. Ferry, 41 N. J. Eq. 432, 5 Atl. 452. A cross bill merely seeking a discovery that could not constitute a defense to the original bill is demurrable. Cook v. Wheeler, Har. (Mich.) 443. A cross bill must be strictly confined to the matters involved in the original cause. Where a bill introduces other distinct matters, it is an original bill, and the suits are separate and distinct. Andrews v. Kibbee, 12 Mich. 94; Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361. A cross bill can be sustained only on matters growing out of the original bill and contained in it; nor can such a bill be filed in any case where the complainant therein could not have filed an original bill for the same purpose. Hackley v. Mack, 60 Mich. 591, 27 N. W. 871. Under the Illinois statute, process is unnecessary to bring in the parties to the original bill to answer to a cross bill; the cross bill is deemed a part or adjunct of the original suit. Fleece v. Russell, 13 Ill. 31. But see Ballance v. Underhill, 3 Scam. (Ill.) 453. A cross bill should present matters which have a bearing upon the allegations of the original bill; and questions entirely different from those presented by the original bill, though connected with the same subject-matter, cannot be introduced by cross bill. Goff v. Kelly, 74 Fed. 327.

[7] Cummings v. Gill, 6 Ala. 562; Aspinwall v. Aspinwall, 49 N. J. Eq. 302, 24 Atl. 926; Andrews v. Gilman, 122 Mass. 471; Smith v. West, 103 Ill. 332; Armstrong v. Bank, 37 Fed. 466. As to the affirmative relief to be obtained by a cross bill, see 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1548, note a, and cases cited. A party cannot by cross bill have affirmative relief in favor of other persons joined as parties, and before the court, and capable of protecting their own interests. Cable v. Ellis, 120 Ill. 136, 11 N. E. 188.

[8] See Ames v. Franklinite Co., 12 N. J. Eq. 66; McPherson v. Cox, 96 U. S. 404.

[9] Story, Eq. Pl. § 392. See Pattison v. Hull, 9 Cow. (N. Y.) 747; Wright v. Miller, 1 Sandf. Ch. (N. Y.) 108.

In such cases, or in any case where a like necessity appears, and a cross bill has not been filed, the court may direct one to be filed,[10] though, in general, resort to this remedy is optional with a defendant. While the cross bill is treated as a dependency of the original suit, or as an auxiliary suit, it seems that it may be filed without leave of court,[11] unlike the supplemental bill; but it still must be presented at the proper time, according to the practice of the court, at the time of answering the original bill,[12] or before the completion and opening for inspection of the testimony in the original case,[13] unless the party filing it is willing to go to a hearing upon the depositions already made known.[14] The court may, however, direct its filing at a later period, the restriction as to time of filing being one affecting the party only.[15]

In its nature and office, the cross bill somewhat resembles the supplemental bill of the complainant, in bringing in new matter to aid the defense to the original bill, or, as now permitted, new parties;[16] but its scope is a more extended one, and, unlike the supplemental bill, it must be entirely complete in itself, and can only be

[10] 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1550. See Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 252; Rogers v. McMachan, 4 J. J. Marsh. (Ky.) 37; Troup v. Haight, Hopk. Ch. (N. Y.) 239.

[11] Neal v. Foster, 34 Fed. 496. But see Indiana S. R. Co. v. Liverpool, London & Globe Ins. Co., 109 U. S. 168, 3 Sup. Ct. 108; Beauchamp v. Putnam, 34 Ill. 378. Followed by Quick v. Lemon, 105 Ill. 578. Cf. Jones v. Smith, 14 Ill. 229; Davis v. Christian Union, 100 Ill. 313.

[12] See Irving v. De Kay, 10 Paige (N. Y.) 319; Allen v. Allen, Hemp. 58, Fed. Cas. No. 18,223. A cross bill, filed before the complainant therein has filed his answer to the original bill, may be stricken from the files on motion. Ballard v. Kennedy, 34 Fla. 483, 16 South. 327.

[13] See Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 250.

[14] Story, Eq. Pl. § 395. See White v. Buloid, 2 Paige (N. Y.) 164; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 250.

[15] See Huber v. Diebold, 25 N. J. Eq. 170. See, also, Pullman Palace-Car Co. v. Central Transp. Co., 49 Fed. 261; Neal v. Foster, 34 Fed. 496; Jackson v. Grant, 18 N. J. Eq. 145.

[16] This seems to be now permissible in several of the states. See Blodgett v. Hobart, 18 Vt. 414; Hurd v. Case, 32 Ill. 45; Hildebrand v. Beasley, 7 Heisk. (Tenn.) 121; Brandon Manuf'g Co. v. Prime, 14 Blatchf. 371, Fed. Cas. No. 1,810; Allen v. Tritch, 5 Colo. 222; Wright v. Frank, 61 Miss. 32; Kanawha Lodge No. 25 v. Swann, 37 W. Va. 176, 16 S. E. 462; Pillow v. Sentelle, 49 Ark. 430, 5 S. W. 783. New matter by way of defense, which requires the intro-

brought by one who could have filed an original bill for the same purpose.[17] As it is dependent upon an original bill, the two are generally considered as one cause,[18] are ordinarily heard together, and the decision rendered upon both embodied in a single decree.[19] Ordinarily, a dismissal of the original bill disposes of the cross bill also,[20] unless affirmative relief is sought by the latter; even then, unless it is filed against the complainant in the original suit.[21]

The Statement.

The statement of the cross bill, as laid down by Judge Story, must "state the original bill, or rather the parties, prayer, and object of it, the proceedings therein, and the rights of the parties exhibiting the bill, which are necessary to be made the subject of cross litigation." [22] It must not contain new and distinct matters, as it can be sustained only upon those growing out of the original bill.[23] It must show a complete cause of action, since the statement of the original bill cannot be called in to aid it in this respect; and the matters stated must not be such as are equally available by way of answer, or a demurrer will be sustained.[24]

duction of new parties, cannot be set up by cross bill. Richman v. Donnell, 53 N. J. Eq. 32, 30 Atl. 533.

[17] Waddell v. Beach, 9 N. J. Eq. 793; Hackley v. Mack, 60 Mich. 591, 27 N. W. 871.

[18] Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 250, 252; Neal v. Foster, 34 Fed. 496.

[19] Ballance v. Underhill, 4 Ill. 453, 462; Moore v. Huntington, 17 Wall. 417; Ex parte Railroad Co., 95 U. S. 221. And see Slason v. Wright, 14 Vt. 208; Cocke v. Trotter, 10 Yerg. (Tenn.) 213.

[20] See Slason v. Wright, 14 Vt. 208; McGuire v. Van Buren Co. Circuit Judge, 69 Mich. 593, 37 N. W. 568; Markell v. Kasson, 31 Fed. 104; Abels v. Railroad Co., 92 Ala. 382, 9 South. 423.

[21] See Chicago & A. R. Co. v. Union Rolling-Mill Co., 109 U. S. 702, 3 Sup. Ct. 594; Jesup v. Railroad Co., 43 Fed. 483; Sigman v. Lundy, 66 Miss. 522, 6 South. 245; Carroll v. Richardson, 87 Ala. 605, 6 South. 342; Dawson v. Amey, 40 N. J. Eq. 494, 4 Atl. 442.

[22] Story, Eq. Pl. § 401. See Ewing v. Patterson, 35 Ind. 326; McDougald v. Dougherty, 14 Ga. 674; Campbell v. Routt, 42 Ind. 410; McGuire v. Van Buren Co. Circuit Judge, 69 Mich. 593, 37 N. W. 568; Neal v. Foster, 34 Fed. 496.

[23] Galatian v. Erwin, Hopk. Ch. (N. Y.) 48.

[24] Ante, p. 305.

The Prayer.

This must be in accordance with the particular object of the bill, and an important requisite is that it must pray for equitable relief, as well as that the cause may be heard at the same time with the original bill, and a single decree rendered upon both.[25]

The Equivalent Remedies under the Codes.

Properly speaking, there is no formal proceeding recognized by the codes which performs the same office as the cross bill, save the cross complaint, where that is allowed, and then only in cases where affirmative relief is sought.[26] New matters arising are supplied by amendment or supplemental answer, and new parties brought in under provisions common to nearly all. If affirmative relief is sought against the plaintiff only, the general remedy is by the use of the counterclaim, which is incorporated in the answer, and not by a separate proceeding like the cross bill, though the principles governing its sufficiency are nearly the same.[27] Some few of the states have provided for cases where one defendant seeks affirmative relief against another, or against the complainant and other defendants, or the complainant and third parties, by the cross complaint, though the grounds for which it may be used are not always the same.[28] Most of the states have made no provision whatever save by the counterclaim, and in some, when the codes are silent, the equity method is held to be still in force.[29] When used, the cross complaint, like the cross bill, must be germane to the original complaint, and cannot introduce new or different matters.

215. BILLS OF REVIEW—A bill of review is one filed to obtain a modification or reversal of a decree, made upon a former bill, which has been signed and enrolled, and, generally, which has also been obeyed and performed.

[25] See the form of a cross bill, Curtis, Eq. Prec. 121.

[26] See Bliss, Code Pl. (3d Ed.) § 390.

[27] Bliss, Code Pl. (3d Ed.) §§ 367–374.

[28] See Bliss, Code Pl. (3d Ed.) § 390.

[29] See Fletcher v. Holmes, 25 Ind. 465; Winslow v. Winslow, 52 Ind. 8; Tucker v. Insurance Co., 63 Mo. 588.

216. It is an available remedy only in case of

(a) Error in law apparent upon the face of the decree, or the proceedings upon which it is based.

(b) Newly-discovered evidence, material to the controversy, and which could not have been discovered and presented by the exercise of due diligence before the decree in question was made.

217. It can be filed only by the parties to the original proceedings or their privies in representation,[1] only within the time allowed for an appeal, and only when the complainant has been aggrieved by the decree. For error in law, apparent upon the face of the decree or proceedings, it may be filed without leave of court, but otherwise if based upon new matter.

218. It can be brought only upon a final decree, not obtained by consent; but, while performance of the decree is generally a condition precedent, it is discretionary with the court to disregard it.

219. The bill must essentially contain

(a) A statement showing proper grounds for its use.

(b) A prayer in accordance with its object.

220. The statement must allege the original bill and the proceedings thereon, the decree and the manner in which the complainant is aggrieved thereby, and the error in law or the new matter by which he seeks to impeach such decree. The prayer must necessarily vary according to the object sought.

Bills of review are still an important class of equitable remedies, and the rules governing their use are, in general, the same as formerly. Their object, as shown by the above propositions, is to obtain a correction or reversal of a decree which has been enrolled, and, in general,

§§ 215–220. [1] One who is not a party to the original suit, and whose rights are in no manner affected by the decree, is not entitled to file a bill of review. Chancellor v. Spencer, 40 W. Va. 337, 21 S. E. 1011.

obeyed and performed, on one of the two grounds mentioned, for which alone it is allowed.[2] The theory of the bill is that, while a court may exercise all necessary supervision and control over its proceedings, orders, or decrees during the existence of the term in which they were heard or made, its power is exhausted by the ending of a term at which a final decree was made, and it cannot resume jurisdiction for the purpose of correcting or reviewing such decree, without a new proceeding.[3] In general, such proceeding must be before a decision upon appeal, or before an appeal has been perfected,[4] though the court of chancery of New Jersey has maintained the contrary doctrine;[5] and the decree to be affected must be a final one,[6]

[2] Story, Eq. Pl. §§ 403, 404; Mitf. Eq. Pl. 83; Coop. Eq. Pl. 89, 91; Beames, Orders Ch. 1. See Gregor v Molesworth, 2 Ves. Sr. 109; Standish v. Radley, 2 Atk. 178; Whiting v. Bank, 13 Pet. 6. In chancery, all matters, whether of discretion or of positive law, are subject to review in a superior court. A bill of review may also be filed in the same court, to correct an error in the original decree. Moore v. Bracken, 27 Ill. 23; Barnum v. McDaniels, 6 Vt. 177; Triplett v. Wilson, 6 Call (Va.) 47; Simms v. Thompson, 1 Dev. Eq. (N. C.) 197; Edmondson v. Moseby's Heirs, 4 J. J. Marsh. (Ky.) 497; Riddle's Estate, 19 Pa. St. 431. A bill of review is proper after a decree is enrolled; a supplemental bill in the nature of a bill of review, before the enrollment. Wiser v. Blachly, 2 Johns. Ch. (N. Y.) 488; Ellzey v. Lane, 2 Hen. & M. (Va.) 589; Iler v. Routh's Heirs, 8 How. (Miss.) 276. A bill of review will not be entertained where it would be unjust and unconscientious to disturb the first decree, or where the same result would take place on a rehearing. Hargraves v. Lewis, 7 Ga. 110. A bill of review lies only for error apparent on the face of the decree, or for after-discovered new matter, and all the parties to the original suit must be brought in by regular process. Heermans v. Montague (Va.) 20 S. E. 899. Any bill whose main purpose is to obtain a new hearing of a controversy already decided, either as question of law or on the same or additional testimony, is a bill of review, or in the nature of a bill of review, even though it involves matters of supplement or revivor or other additional elements. Eveland v. Stephenson, 45 Mich. 394, 8 N. W. 62.

[3] See Ex parte Lange, 18 Wall. 163; Sibbald v. U. S., 12 Pet. 488; Jackson v. Ashton, 10 Pet. 480; Grames v. Hawley, 50 Fed. 319. The actual enrollment of decrees under the old rules as to bills of review is not now of importance. For the reason for the former requirement, see Gilb. For. Rom. Ch. 10, 182. A bill of review does not constitute a part of the original cause, but is an independent proceeding. Cole v. Miller, 32 Miss. 89.

[4] See Southard v. Russell, 16 How. 547.

[5] See Putnam v. Clark, 35 N. J. Eq. 145.

[6] Story, Eq. Pl. § 408a. See Whiting v. Bank, 13 Pet. 6; Ray v. Law, 8

as well as one not entered by consent of the parties,[7] though it seems that a mistake in the latter may be corrected by this method;[8] and the bill must be filed in the court in which the decree was made.[9] The bill is in the nature of the writ of error at common law, and, for error in law, is filed without leave of court, while, if for new matter, it is filed only upon special leave.[10]

Errors in Law.

The first of the two grounds for a bill of review is error in law apparent,—that is, error which appears upon the face of the decree by reason of the latter being contrary to the provisions of a statute, or to some settled legal or equitable principle or rule;[11] as if a decree directed the legacy belonging to a child, who had died intestate without wife or children, to be divided among those not entitled to it by the statute of distributions;[12] or a decree setting aside conveyances as fraudulent upon the statements of the pleadings only, without any evidence of fraud being received;[13] or a decree containing an errone-

Cranch, 179; Jenkins v. Eldredge, 3 Story, 299, Fed. Cas. No. 7,267; ante, c. 3, p. 153.

[7] Armstrong v. Cooper, 11 Ill. 540; Hargraves v. Lewis, 7 Ga. 110, except in case of fraud; Flagler v. Crow, 40 Ill. 414; Cornish v. Keesee, 21 Ark. 528.

[8] Vincent v. Matthews, 15 R. I. 509, 8 Atl. 704. But it seems that a bill of review containing a bare allegation of mistake, without any account of how it was made, or in what it consisted, will not be sustained. Hendrix's Heirs v. Clay, 2 A. K. Marsh. (Ky.) 462.

[9] Wilson v. Wilson, 10 Yerg. (Tenn.) 200. And see Barrow v. Hunton, 99 U. S. 80.

[10] Ross v. Prentiss, 4 McLean, 106, Fed. Cas. No. 12,078. See, also, Berry v. Stockwell, 10 B. Mon. (Ky.) 299; Webb v. Pell, 1 Paige (N. Y.) 564; Kenon's Ex'rs v. Williamson, 1 Hayw. (N. C.) 350; see post, p. 314, note. An application for leave to file a bill to review a decree which has been affirmed by the supreme court should be made to the trial court, and not to the supreme court. Schaefer v. Wunderle, 154 Ill. 577, 39 N. E. 623.

[11] Story, Eq. Pl. §§ 405–407. A bill of review will lie for error of law apparent upon the face of the decree. Campbell v. Snyder, 27 Or. 249, 41 Pac. 659. A bill of review to revise a judgment for errors apparent upon the face of the record is not recognized in Texas; the remedy is by appeal or writ of error. Moore v. Perry (Tex. Civ. App.) 35 S. W. 838.

[12] Coop. Eq. Pl. 89, 90. See Gregor v. Molesworth, 2 Ves. Sr. 109.

[13] Clark v. Killian, 103 U. S. 766.

ous finding, not justified by the facts recited.[14] Mere errors of form or questions as to the propriety of the decree will not be sufficient.[15]

The method of framing decrees in this country being different from that in England in not reciting the previous proceedings, the bill of review with us contemplates an examination of all the proceedings, commencing with the original bill, all forming part of the record;[16] but, with this qualification, the rules governing the use of the bill for errors in law are as above stated.

New Matter.

The discovery of new matter, such as a release or receipt, which would change the merits of the claim upon which the decree in question was formed, furnishes the second class of cases in which a bill of review may be sustained; and the rule in force here is similar to that regarding newly-discovered evidence upon which a retrial is sought at common law.[17] Two conditions must exist: (1) The new matter must be relevant and material, not merely cumulative, and such as, if known, would probably have produced a different result;[18] and (2) it must not only be such as actually first became known to the party too late for use at the original hearing,[19] but also such as he could

[14] See Jackson v. Jackson, 144 Ill. 274, 33 N. E. 51.

[15] 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1576. See Perry v. Phelips, 17 Ves. 173; Trulock v. Robey, 15 Sim. 265; Berdanatti v. Sexton, 2 Tenn. Ch. 699; Freeman v. Clay, 2 C. C. A. 587, 52 Fed. 1.

[16] Story, Eq. Pl. § 407. See, also, Dexter v. Arnold, 5 Mason, 311, Fed. Cas. No. 3,856; Webb v. Pell, 3 Paige (N. Y.) 368; Buffington v. Harvey, 95 U. S. 99; Putnam v. Day, 22 Wall. 60.

[17] See Shipman, Com. Law Pl. p. 187. Where, after final judgment and the denial on appeal of motions for rehearing and for leave to introduce further testimony, the defeated party presents new affidavits, containing material evidence, discovered since the cause was heard in the court below, and shows that he was not at fault in not producing the same on the former hearing, leave will be granted to file a bill of review on payment of costs in the supreme court. Mosher v. Mosher (Mich.) 66 N. W. 486.

[18] Mitf. Eq. Pl. 84, 85; Ord v. Noel, 6 Madd. 127; Wiser v. Blachly, 2 Johns. Ch. (N. Y.) 488; Livingston v. Hubbs, 3 Johns. Ch. (N. Y.) 124; Aholtz v. Durfee, 122 Ill. 286, 13 N. E. 645; Reynolds v. Reynolds' Ex'r, 88 Va. 149, 13 S. E. 598. And see, also, Southard v. Russell, 16 How. 547; Traphagen v. Voorhees, 45 N. J. Eq. 41, 16 Atl. 198; Inhabitants of Warren v. Inhabitants of Hope, 6 Me. 479; Crooker v. Randall, 53 Me. 355.

[19] Story, Eq. Pl. § 413. According to the authorities, the new matter must

not have discovered in time by the use of due diligence.[20] The question of diligence in ascertaining and presenting facts is always an important one, and the rule is strictly applied; but the test of materiality, or the meaning of the term "material," is not entirely clear. Generally, it has been said that the new matter must be such as will prove or disprove what was before in issue, and not such as presents a new issue;[21] but it has also been laid down, and seems now settled, that new matter clearly demonstrating that the decree was erroneous, though not supporting any previous issue, will sustain a bill of review;[22] and this would be true, it seems, in any case where no other method of relief was available. A bill of review for new matter is not filed as a matter of right, as in the case of one for error in law apparent, but only after leave of court has been obtained.[23]

Bills of review are still in common use, and the rules governing them are, in general, still the same as formerly. As shown by the above propositions, the object of the bill is to obtain a correction or reversal of a decree after enrollment, for error in law apparent upon the face of the decree, or, as it must generally be in American

not have been discovered until after publication passed. See Dexter v. Arnold, 5 Mason, 303, Fed. Cas. No. 3,856; Wiser v. Blachly, 2 Johns. Ch. (N. Y.) 488. A bill of review on the ground of newly-discovered evidence cannot be sustained where such evidence was in possession of the plaintiff at the original trial, but he failed to use it, because relying on other facts as a defense. McGuire v. Gallagher, 95 Tenn. 349, 32 S. W. 209.

[20] Massie v. Graham, 3 McLean, 41, Fed. Cas. No. 9,263; Stevens v. Hey, 15 Ohio, 313; Hodges v. Millikin, 1 Bland (Md.) 503; Bradshaw v. Garrett, 1 Port. (Ala.) 47. The question of diligence may be examined at the hearing. Jenkins v. Prewitt, 5 Blackf. (Ind.) 7. A bill of review alleging after-discovered evidence should be dismissed where due diligence would have put the party filing the bill in possession of all the facts. Sanders v. Burk (Va.) 22 S. E. 516.

[21] Mitf. Eq. Pl. 85–87.

[22] See Story, Eq. Pl. § 416; Partridge v. Usborne, 5 Russ. 195; Dexter v. Arnold, 5 Mason, 313, Fed. Cas. No. 3,856, and cases cited; Massie v. Graham, 3 McLean, 41, Fed. Cas. No. 9,263.

[23] Story, Eq. Pl. § 417. See Bennet v. Lee, 2 Atk. 528; Young v. Keighly, 16 Ves. 348; Dexter v. Arnold, 5 Mason, 303, Fed. Cas. No. 3,856; Thomas v. Harvie's Heirs, 10 Wheat. 146; Wood v. Mann, 2 Sumn. 316, Fed. Cas. No. 17,953. See ante, p. 312, note. The fact that a bill of review is filed by order of court does not estop the court from hearing the bill on demurrer. McGuire v. Gallagher, 95 Tenn. 349, 32 S. W. 209.

practice, on the face of the proceedings, or for newly-discovered evidence, which, in accordance with a rule of universal application in all judicial proceedings, must be such as is material, and also such as could not, by the use of due diligence, have been discovered and presented before the decree in question was made.

The Statement.

"In a bill of this nature, it is necessary to state the former bill and the proceedings thereon, the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it, and the ground of law or matter discovered upon which he seeks to impeach it." [24] If the decree is to be impeached upon the ground of new matter, as leave of court is a condition precedent to filing of the bill, the granting of such leave should be stated, and the facts as to the discovery of such evidence,[25] as well as what the evidence is; since the relevancy of the new facts will be, in such case, the test as to whether leave to file the bill will be granted.[26]

The Prayer.

The bill may simply pray that the decree may be reviewed and reversed on the point complained of, if not carried into execution; [27] and, if it has been executed, the prayer may be also for the further decree of the court to restore the party complaining to the situation in which he would have been had the original decree not been rendered. On the contrary, if brought to review the reversal of a former decree, it may pray that such decree may be allowed to stand; [28] and the prayer may be otherwise varied to suit conditions of the bill, as it may be also a bill of revivor,[29] or be united with a supplemental bill.[30]

[24] Story, Eq. Pl. § 420. See Thompson v. Maxwell, 95 U. S. 391; Brown v. White, 16 Fed. 900; Cox v. Lynn, 138 Ill. 195, 29 N. E. 857. A bill of review must state substantially the former bill or bills, the decree, and proceedings thereon. Dunn's Ex'rs v. Renick (W. Va.) 22 S. E. 66.

[25] See 2 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 1580; Mitf. Eq. Pl. 88, 89.

[26] See Greer v. Turner, 47 Ark. 17, 14 S. W. 383; Lorentz v. Lorentz, 32 W. Va. 556, 9 S. E. 886; Aholtz v. Durfee, 122 Ill. 286, 13 N. E. 645.

[27] Mitf. Eq. Pl. 88, 89; Perry v. Phelips, 17 Ves. 177.

[28] Dexter v. Arnold, 5 Mason, 308, Fed. Cas. No. 3,856.

[29] Story, Eq. Pl. § 420. See Wilkinson v. Parish, 3 Paige (N. Y.) 653.

[30] Story, Eq. Pl. § 420. See Price v. Keyte, 1 Vern. 135.

Bills in the Nature of Bills of Review.

Bills of this character, according to the theory in pursuance of which they were originated, were brought for the review of a decree which had not been enrolled; and this distinction was the principal one between them and "bills of review," properly so called.[31] As all decrees and judgments of the federal courts in this country are now deemed to be and are treated as enrolled as of the term at which they were rendered,[32] this class does not require further consideration here, as it is uncertain whether the distinction is still recognized by any state court of chancery.

221. BILLS TO IMPEACH DECREES FOR FRAUD—A bill of this character is one filed to set aside or to annul a decree obtained by fraudulent means, as where persons whose rights are affected by such decree were not made parties to the suit in which it was rendered.

222. It is of an original nature, and may be filed without leave of court.

Properly speaking, and in view of its nature and object, a bill of this class is an original bill, in the nature of a bill of review; original in its nature, since it is an independent proceeding, to establish the fraud claimed to exist, and a bill of review to the extent that it contemplates the examination and abrogation of a decree upon such fraud being proved.[1] Any decree which has been obtained without making all persons whose rights are affected by it parties to the suit in which it is thus rendered is fraudulent and void as to such

[31] Story, Eq. Pl. § 421. See Perry v. Phelips, 17 Ves. 178; Wiser v. Blachly, 2 Johns. Ch. (N. Y.) 488; Bank v. Loomis, 2 Sandf. Ch. (N. Y.) 70; Dexter v. Arnold, 5 Mason, 303, Fed. Cas. No. 3,856. The text of the authorities gives the distinction noted as the only one, but it seems to have been held formerly that a bill in the nature of a bill of review could not be sustained for errors in law apparent upon the face of the decree. See Perry v. Phelips, 17 Ves. 178; Hodson v. Ball, 1 Phil. Ch. 177.

[32] Whiting v. Bank, 13 Pet. 6; Dexter v. Arnold, 5 Mason, 303, Fed. Cas. No. 3,856.

§§ 221–222. [1] Story, Eq. Pl. §§ 426, 427. See Sheldon v. Aland, 3 P. Wms. 111; Barnesly v. Powel, 1 Ves. Sr. 120.

persons.[2] Thus, a decree against a trustee, and affecting the rights of his cestui que trust, will, if the latter has not been brought before the court and the trust discovered, be thus treated,[3] and so as to one obtained by the concealment of any material fact. A decree thus obtained is not only void as to persons whose rights are directly affected by it, but will afford no protection to a purchaser under it with notice of its character.[4]

The question in issue upon such a bill is the existence of the fraud complained of, which must be established by proof, before the propriety of the decree can be investigated.[5] The bill may be filed without leave of court.[6] The statement in a bill of this character is similar to that in all bills dependent upon one already filed, but it must clearly set forth the fraud or ground for impeachment; and the prayer must also be varied according to the nature of the fraudulent or improper means used, and the extent to which they were effective in obtaining an improper decision.[7]

223. BILLS TO SUSPEND OR AVOID THE OPERATION OF DECREES—Bills of this character were filed, in England, for the objects indicated in the title, under the extraordinary power of chancery, and, in early times of great political disturbance, to relieve cases of extreme hardship or necessity, but are not known at the present day.

Bills of the above class are among those enumerated by Judge Story,[1] and are mentioned here for the reason that they seem to have been always noticed by the earlier authorities; but it is not believed that they are available in this country at the present day. The instances in which they were allowed in England seem to have

[2] Coop. Eq. Pl. 96–98. [3] Story, Eq. Pl. § 427. [4] Coop. Eq. Pl. 96–98.

[5] Story, Eq. Pl. § 426; Coop. Eq. Pl. 96–98, and cases cited; Kennedy v. Daly, 1 Schoales & L. 355; Barnesly v. Powel, 1 Ves. Sr. 120; Sheldon v. Aland, 3 P. Wms. 111.

[6] Story, Eq. Pl. § 426.

[7] See Story, Eq. Pl. § 428; Giffard v. Hort, 1 Schoales & L. 386; Kennedy v. Daly, Id. 355. Necessary party to bill of this character, Harwood v. Railroad Co., 17 Wall. 78.

§ 223. [1] Story, Eq. Pl. § 428a.

been such as would not now arise, and to have occurred at times of great political disturbance, as well as at a period when the powers of the court of chancery in England were not as clearly defined as later, or as is now established in this country.

224. BILLS TO EFFECTUATE OR CARRY OUT DECREES —A bill of this character is one filed to carry a decree into execution when, by reason of neglect of the parties or from some other cause, it has become impossible to do so without the further decree of the court to that end.

225. Its effect is to enforce the decree in general, without varying it, though under proper circumstances the original decree may be varied in case of mistake in its directions.

The province of a bill of this character is sufficiently explained above, and the necessity for its use arises where persons who have obtained a decree have neglected to proceed under it until their rights have been so affected by subsequent events that it is necessary to obtain a further decree to ascertain and settle them.[1] It may be brought by a party to the decree, or by or against one claiming as an assignee of such party, or by one who is not a party, who is unable to obtain a determination of his own rights until the decree is carried into execution, or who claims in a similar interest to one who is a party.[2] In general, the court will only enforce the decree as rendered, but it has, under proper circumstances, varied the original directions in case of mistake in the latter.[3] In conformity with its general object, a bill of this character may be brought to enforce the judgment of an inferior court of equity, if the jurisdiction of the latter is insufficient for the purpose.[4] As this form of bill is partly original, and partly in

§§ 224–225. [1] Story, Eq. Pl. § 429.
[2] Mitf. Eq. Pl. 95; Coop. Eq. Pl. 98, 99.
[3] Mitf. Eq. Pl. 95, 96.
[4] Mitf. Eq. Pl. 96, 97.

the nature of an original bill, and may be also a bill of revivor or supplemental bill, or both, its form and structure will vary accordingly.[8]

GENERAL RULES GOVERNING THE BILL—IN GENERAL.

226. In all cases where the interference of a court of equity is sought, the complainant must not only clearly show, by proper allegations, his title or right to sue, and his right to demand the aid of the court in his behalf, but also that the case is one within its jurisdiction, and in which its remedial powers should properly be exercised.

The general requisites of the statement of the complainant's cause of action, as covered by the stating part of the bill, have already been noticed; but a further statement and explanation is necessary as to the general rules which obtain in equity pleading as to the frame and structure of the bill, particularly as to the manner in which the facts necessary to be stated must be set forth, and as to the faults which should be avoided, and also the consequences of defective pleading. The rules as to certainty, consistency, directness, etc., are substantially the same as at common law, and rest, in general, upon the same principles; and the rule against multifariousness in the statement of the cause of action is supported by substantially the same foundation as upholds the common-law rule against double pleading, while the misjoinder of parties is equally objectionable to both systems.

SAME—SUFFICIENCY.

227. Every fact essential to the complainant's title or right to sue, and to obtain the relief sought, must be clearly stated in the bill. Facts not charged are not in issue, and cannot be proved, nor can relief be granted upon them, as the court pronounces its decree secundum allegata et probata.

[8] Story, Eq. Pl. § 432. See Pott v. Gallini, 1 Sim. & S. 206.

228. When discovery is sought in aid of and as incidental to relief, the matters set forth in the bill must be such as clearly entitle the complainant to such discovery. A discovery of immaterial matters will not be compelled.

229. Where the entire matter in dispute should properly be the subject of a single suit, the complainant cannot divide a single cause of action, and proceed for a part only.

The Facts to be Stated.

It is an elementary rule of the most extensive influence and application, that the bill must clearly state every fact which is essential to the complainant's title or right to sue, and to obtain the relief he seeks.[1] A disregard of this rule will render the bill fatally defective, since no facts can be properly in issue unless charged in the bill; and, of course, no proof can be offered to substantiate facts not alleged. Again, although the existence of such facts may be apparent from other parts of the pleadings and evidence, no relief can be granted as to them, as a court of equity pronounces its decree only according to the allegations and proof.[2] The reason of the rule is the same principle that underlies all the specific requirements as to both the facts to be stated and the manner of stating them, viz. that the defendant may be fully and clearly apprised by the bill as to the nature and extent of the case against which he must prepare his defense.

As already explained,[3] the statement must show both the title or interest of the complainant and his right to sue, and the interest and liability of the defendant, by a clear and full statement of the

§§ 227–229. [1] Story, Eq. Pl. § 257; Davenport v. Alston, 14 Ga. 271; Nolley v. Rogers, 22 Ark. 227; Briant v. Corpening, Phil. Eq. (N. C.) 325; Crocket v. Lee, 7 Wheat. 522; James v. McKernon, 6 Johns. (N. Y.) 564. As an application of the rule as to sufficiency, see Dunham v. Railroad Co., 1 Bond, 492, Fed. Cas. No. 4,150.

[2] Crocket v. Lee, 7 Wheat. 522; Jackson v. Ashton, 11 Pet. 229; James v. McKernon, 6 Johns. (N. Y.) 564; Brainerd v. Arnold, 27 Conn. 617; Stucky v. Stucky, 30 N. J. Eq. 546; Hart v. Stribling, 21 Fla. 136; Grosholz v. Newman, 21 Wall. 481.

[3] Ante, p. 193.

facts which are to be established by evidence. The bill must thus state a case upon which, if admitted by the answer, a decree can be made;[4] and the statement must show in detail the facts upon which it rests, and not a series of conclusions or inferences as to the effect of such facts. Thus, for example, if an obligee in a bond should bring a bill to recover the amount of the bond from an heir of the obligor, alleging real assets in the hands of the heir, by descent, the bill will be demurrable, unless it also states, positively and directly, that the defendant is heir, and, as such, is bound by the bond.[5] So, when a complainant claims a right as substituted trustee, he should distinctly aver all material facts necessary to show that such a vacancy had occurred as to authorize his appointment.[6] And, if a bill is brought in aid of an action at law, it should allege by whom and against whom such action has been or is to be brought, and such other material circumstances as may be necessary to enable the court to determine as to the plaintiff's right of action, since a court of equity will not entertain a bill in such a case, unless it shows a proper case for its interposition.[7] A bill brought to set aside judicial proceedings, but not filed until five years after the completion of such proceedings, must state a reason for the delay; and, if ignorance of frauds claimed to have been practiced in connection with such proceedings is relied upon as an excuse, it should also appear when a knowledge of such frauds was first obtained.[8]

Discovery of Immaterial Matters.

It is a rule that the matters stated in the bill should be such as clearly entitle the complainant to all the discovery which he seeks in aid of his prayer for relief, as a discovery of immaterial matters will not be enforced against the defendant, and if the bill calls

[4] Perry v. Carr, 41 N. H. 371.

[5] Crosseing v. Honor, 1 Vern. 180. See, also, Piper v. Douglas' Ex'r, 3 Grat. (Va.) 371.

[6] Cruger v. Halliday, 11 Paige (N. Y.) 314, 320.

[7] Mayor, etc., v. Levy, 8 Ves. 398, 401.

[8] Harwood v. Railroad Co., 17 Wall. 78. See, also, Hambrick v. Dickey, 48 Ga. 578; Angell v. Stone, 110 Mass. 54; Mellendy v. Austin, 69 Ill. 15; Ahrend v. Odiorne, 118 Mass. 261. As to the requisites of a bill to enforce the right to redeem, see Malony v. Rourke, 100 Mass. 190.

for it, it will be demurrable to that extent. Thus, where a bill to redeem was filed by a mortgagor against a mortgagee, seeking a discovery whether the mortgagee was a trustee, a demurrer to the discovery was allowed, for the reason that, as no trust was declared upon the mortgage, it was not material to the relief prayed whether there was any trust reposed in the mortgagee or not.[9]

Splitting a Cause of Action.

As courts of equity discourage the promotion of unreasonable litigation, they will not permit a complainant to bring a bill for a part of a matter only, by splitting or dividing his cause of action, where the whole claim or demand is properly a subject for a single suit.[10] Thus, for example, they will not permit a party to bring a bill for a part of an entire account, but will compel him to unite the whole in one suit, as otherwise he might subject the defendant to vexatious and oppressive litigation, by attempting to enforce his claim in separate suits;[11] and it is a recognized right of the defendant that a bill against him shall include all that is proper for determination in the suit thereby instituted.

SAME—CERTAINTY.

230. In its statement of the complainant's cause of action, as well as in its prayer, the bill should be framed with sufficient certainty to apprise the defendant of the nature of the case which he is called upon to meet, and to enable the complainant, upon proof, to obtain both the relief and the discovery sought. The degree of certainty required is, in general, that of certainty to a common intent, as in pleas in bar at common law.

231. The bill must be certain in its averments of the title or right upon which it is founded, stating all material facts, including the title or interest of the complainant, the interest of the defendant, the prop-

[9] Mitf. Eq. Pl. 192; Harvey v. Morris, Finch, 214.

[10] Story, Eq. Pl. § 287.

[11] Purefoy v. Purefoy, 1 Vern. 28; Newland v. Rogers, 3 Barb. Ch. (N. Y.) 432, 435.

erty or subject-matter in controversy, and all necessary circumstances of time, place, manner, etc., with reasonable fullness and particularity. General allegations will not ordinarily be sufficient, nor can the complainant set forth his title in the alternative.

QUALIFICATIONS—(a) It is not necessary to state matters which the court will judicially notice.

(b) It is not necessary to allege circumstances necessarily implied.

(c) It is not necessary to allege what the law will presume.

(d) General statements may be allowed when great prolixity is thereby avoided.

(e) Less particularity is required when the facts lie more in the knowledge of the defendant.

(f) No greater particularity is required than the nature of the matters set forth will conveniently admit.

(g) A loose and uncertain statement of some of the material facts may destroy the effect of other facts properly stated, when all such facts are connected with and dependent upon each other.

The General Rule.

The requirements as to certainty in equity pleading are substantially the same as at common law, though the rules are somewhat more liberal, the precise and categorical method of the common law not being followed.[1] According to the theory of the equity system, the statement by the complainant, being one of facts, is necessarily more detailed and extended than in a declaration at common law, and the rules governing the method of statement are therefore less imperative as to absolute precision and accuracy of statement; and, as in equity a narrative form is adopted rather than an arbitrary or fictitious formula, the reason is obvious. As established, however, the rules in equity must be fully observed, as their foundation is the same as that

§§ 230–231. [1] See Mutual Life Ins. Co. of New York v. Sturges, 33 N. J. Eq. 328; McEwen v. Broadhead, 11 N. J. Eq. 129. As to when the strict degree of certainty will be required, see Gibson's Suits in Chancery, § 201.

of the rules at common law,—to properly inform the defendant as to all that he must oppose.[2]

At common law, three degrees of certainty have been recognized: (1) Certainty to a common intent; (2) certainty to a certain intent in general; and (3) certainty to a certain intent in every particular.[3] The first of these calls for a statement which is clear enough according to reasonable intendment or construction, though not worded with absolute precision, but it cannot add to a sentence words which have been omitted, as it is a rule of construction only. Except in a few instances, which will hereafter be noticed, this rule is the one applied, in equity pleading, to the statement of facts in the bill. A greater degree is required in pleas,[4] but a less in answers.[5]

Causes of Uncertainty.

Uncertainty in the bill may arise in various ways, of which the following are the most common: (1) By attempting to set out a case which in itself is too vague and uncertain to entitle the complainant to relief, as where the bill shows no definite equity in the complainant, upon the facts stated, by reason of inconsistency or insufficiency in the statement of such facts, leaving the defendant in doubt as to what he shall answer, and the court as to what relief is to be decreed, if any; (2) by a loose and general statement of facts, which renders a case, good if properly stated, so vague and uncertain that a proper answer or decree cannot be made. Thus, when the East India Company brought a bill against one of its servants for a breach of his covenants while in their employment, alleging that he had entered into a combination with the board of trade at a certain place to defraud the company, that he had made certain false representations to the company in his letters, as well as false charges against it, and had made large profits in his transactions with the natives, and prayed an account of profits derived by him, etc., the bill was held bad on demurrer on account of the vague and indeterminate manner in which the charges were stated. The proper mode of stating such charges

[2] See Marsells v. Banking Co., 1 N. J. Eq. 31.

[3] Shipman, Com. Law Pl. (2d Ed.) p. 418.

[4] Post, p. 433.

[5] Post, c. 8, p. 500.

would have been to have alleged that the defendant exercised the trade under the orders of the company, and, under color of his contract of employment, received and appropriated the profits as his own, whereas it was the trade of the company.[6] So, where, in setting forth a right of common and of way, the bill alleged that the tenants, owners, and occupiers of certain lands of a manor, "in right thereof or otherwise," from time whereof the memory of man is not to the contrary, had, and of right ought to have, common of pasture, etc., in a certain waste, etc., it was held that the use of the words "or otherwise" left the right attempted to be described entirely indefinite, and that any sort of right might be proved.[7] (3) By stating a portion of facts which are material and connected with each other in such a loose and incomplete manner as to destroy the effect of the remainder of such facts, though the latter are properly stated. Thus, if a bill should in one part allege an agreement, and in another part charge that there was no agreement, but only an understanding.[8] Further instances of the manner in which a bill may be uncertain will be hereafter given in noticing the matters as to which certainty is required.

Title or Interest.

It has already been stated that an essential part of the complainant's cause of action is his title or interest in the subject-matter, which must clearly appear in the bill, or no right to relief can be shown. As to the method of stating this, the rules in equity are substantially the same as at common law,—that, except in cases where a title by possession is sufficient, the facts regarding the title asserted must be fully and precisely alleged, and that, where a claim rests upon a title derived from others, the derivation must be shown.[9] In stating the ownership of real property in fee

[6] East India Co. v. Henchman, 1 Ves. Jr. 287. See, also, Jones v. Jones, 3 Mer. 161; Duke of Brunswick v. King of Hanover, 6 Beav. 159; Armitstead v. Durham, 11 Beav. 422.

[7] Cresset v. Mitton, 1 Ves. Jr. 449. See, also, Mayor, etc., of London v. Levy, 8 Ves. 398; Gell v. Hayward, 1 Vern. 312.

[8] Morris v. Morgan, 10 Sim. 341. See, also, Edwards v. Edwards, Jac. 335; Bridger v. Thrasher, 22 Fla. 383; and the explanation as to inconsistency, post, p. 333; and "Repugnancy," post, p. 334.

[9] See Shipman, Com. Law Pl. c. 9, §§ 292–305.

simple, a general allegation of the fact ordinarily would be sufficient, and it has been recommended by an eminent authority [10] that the established forms of expression used in common-law procedure should be adopted wherever practicable. If the title is a derivative one, the rule of the common law, that its derivation—that is, its commencement—should be shown, is applicable, though not always with the same strictness.[11] Thus, if the complainant claims as heir, he should state the facts as to his heirship, and, if not claiming by immediate descent, should set forth his pedigree,[12] though it has been held that, where there was a clear and plain averment of title as heir, it was not necessary, in the case of a bill for the discovery and delivery of title deeds, to state every link of the pedigree.[13] The application of the rules as to pleading title, so far as may be gathered from the decisions, would seem to depend somewhat upon the particular circumstances of each case, the test being whether the defendant is sufficiently informed, and whether the complainant's title as stated is clearly and fully shown, independent of the evidence.[14]

The title or interest of the defendant, where one is to be alleged,

[10] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) § 362.

[11] See Smith v. Austin, 9 Mich. 465, 475; McKinley v. Irvine, 13 Ala. 681, 698.

[12] This is the common-law rule (Shipman, Com. Law Pl. [2d Ed.] § 298); and that it applies to some extent in equity, see 1 Fost. Fed. Prac. (2d Ed.) § 78; 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 320. So far as can be gathered from the decisions in this country, the former rule seems to have been departed from much less than in England, and to be applied according to the circumstances of each case.

[13] Ford v. Peering, 1 Ves. Jr. 72. See, also, Delorne v. Hollingsworth, 1 Cox, Ch. 421.

[14] See Humphreys v. Tate, 4 Ired. Eq. (N. C.) 220. A bill seeking a decree against the legal assignee of a bond and mortgage, to establish an equitable ownership therein in the complainant, must show how he became entitled. Phillips v. Schooley, 27 N. J. Eq. 410. A bill to quiet title, alleging the complainants' seizin and possession, and that they have a direct chain of title from the government, is not defective in the averment of ownership. Hanscom v. Hinman, 30 Mich. 419. So the facts constituting the appointment of a trustee should be stated, and not a bare allegation of the appointment. Evan v. Avon, 29 Beav. 144. See Cruger v. Halliday, 3 Edw. Ch. (N. Y.) 565. See, also, Champlin v. Parish, Id. 581; Smith v. Austin, 9 Mich. 465, 475; McKinley v. Irvine, 13 Ala. 698. See, also, Norris v. Lemen, 28 W. Va. 336.

may be stated in general terms, as at common law,[15] for the reason that the complainant is not supposed to have full knowledge regarding it, while the defendant is fully informed, and facts peculiarly within the latter's knowledge need not be precisely alleged.[16]

Time.

As at common law, time, whenever material to the merits of the case to be established, must be alleged, and if it forms part of the description of written instruments, as a promissory note or a deed upon which the suit is based, or when the terms of a written contract are stated, in which time, as is generally the case in contracts for the sale of real property, is made of the essence of the contract, must be correctly stated, in order to avoid a variance between pleading and proof.[17] The same degree of certainty should also be observed where it is necessary, in the particular case, for the information of the defendant and the court, to obviate doubt or uncertainty as to the actual time to be established;[18] but it is generally sufficient, in other cases, to allege an act as having occurred "on or about" a certain date, this phrase having an accepted meaning, and allowing proof of the true time to be made.[19]

Place.

While the fictitious venue of the common law, by which a place was assigned for every traversable fact, is unknown in equity pleading, whenever the element of place becomes a jurisdictional fact, as, for instance, in the location of real estate, it must appear

[15] Story, Eq. Pl. § 255. See Baring v. Nash, 1 Ves. & B. 551.

[16] See Jerome v. Jerome, 5 Conn. 356; Robinson v. Robinson, 73 Me. 170.

[17] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 369, 370. Merritt v. Brown, 19 N. J. Eq. 293. It is a cardinal rule of pleading in equity that a party cannot be permitted at the hearing to show a different title from that set up in his bill, nor can proofs be offered or relief granted upon facts not stated in the bill. Kidd v. Manley, 28 Miss. 156.

[18] A bill to enforce a judgment as against a mechanic's lien must specify the dates of commencing work and furnishing labor and materials under the contract. McKee v. Insurance Co., 41 Fed. 117.

[19] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 369, 370. See Richard v. Evans, 1 Ves. Sr. 39. See, also, as to other forms of expression, Baker v. Wetton, 14 Sim. 426; Edsell v. Buchanan, 4 Brown, Ch. 254.

by a proper averment, stating it correctly and with sufficient particularity to clearly identify the place sought to be described.[20]

Matters in Knowledge of Defendant.

In both common law and equity pleading, it is a rule that such matters as properly lie within the knowledge of the opposing party require less precision of statement than when known to the party pleading, and may therefore be alleged in general terms.[21] Thus, in stating the interest or title of a defendant, a general allegation that (for example) the defendant is seised in fee of, or otherwise well entitled to, the remaining undivided parts of the premises, as to a part of which the complainant claims title, is sufficient, without going into the facts which evidence such title;[22] and the same is true as to any claims of the defendant which the bill attempts to negative.[23] The statement, as will be elsewhere noticed, may in such case be made by the complainant, upon information and belief, if the fact is charged in the bill as within the defendant's knowledge, or must of necessity be so; but even then the fact must be clearly asserted by an averment that it exists, and not merely that the complainant is so informed and believes.[24] The same method of statement is permitted as to any matter essential to the determination of the complainant's claim, and which is necessarily within the defendant's knowledge, or so charged in the bill; but there must also be an averment of the fact, as already stated.

General Statements — When Allowed.

The rule as to precision and accuracy of statement is not fully obligatory in cases where a compliance would involve the statement of a great number of minute circumstances, which go to confirm or establish a precise fact, and are therefore more properly matters of evidence than of allegation. In accordance with another rule, the bill, save perhaps for purposes of discovery, is required to state facts, not evidence; but a line is necessarily drawn, even in the statement of facts, at the limit where prolixity and

[20] See Scott v. Sells, 88 Cal. 599, 26 Pac. 350; Bryant v. Bryant (Ky.) 20 S. W. 270.

[21] Mitf. Eq. Pl. § 42; Shipman, Com. Law Pl. (2d Ed.) p. 428.

[22] Story, Eq. Pl. § 255; Baring v. Nash, 1 Ves. & B. 551.

[23] Story, Eq. Pl. § 255.

[24] Post, p. 336; Lord Uxbridge v. Staveland, 1 Ves. Sr. 56.

confusion would result from too great particularity of detail, and it is permissible to make general statements of fact, as where it is sought to set aside a bond, a deed, or an award for either fraud, partiality, or undue practices, notwithstanding the general rule as to alleging fraud and other similar grounds for relief, without a detailed and minute statement of every particular circumstance going to establish the ground relied on.[25]

Pleading Acts or Matters Regulated, but not Created, by Statute.

It is a rule of common-law pleading that where an act, valid at common law, is regulated in regard to the mode of performance by statute, it is sufficient to use the same certainty of allegation as before the statute.[26] In other words, where a contract by parol was valid at common law, it need not be pleaded as in writing because a subsequent statute requires it to be so made. Thus, at common law, a lease for any number of years might be made by parol; but, by the statute of frauds, all leases for a time exceeding three years could have only the effect of leases at will, unless in writing, and signed by the lessors or their duly-authorized agent; yet, notwithstanding the statute, a demise for any number of years could be pleaded without alleging that it was in writing.[27] The same rule, it is believed, holds good under the equity system; and in pleading a contract required by statute to be in writing, and not dependent upon the statute for its validity, it is not generally necessary to allege more than would have been required previous to the statute. To this, however, the qualification should be added

[25] Chicot v. Lequesne, 2 Ves. Sr. 315, 318. See, also, Aikin v. Ballard, Rice, Eq. (S. C.) 18; Clark v. Periam, 2 Atk. 337; Bolgiano v. Cooke, 19 Md. 375; Riley v. Carter, 76 Md. 581, 25 Atl. 667.

[26] If a contract for the sale of land, required by the statute of frauds to be in writing, is shown by the bill to have been by parol, the bill is demurrable. See Cozine v. Graham, 2 Paige (N. Y.) 177; Ahrend v. Odiorne, 118 Mass. 261, 268; Macey v. Childress, 2 Tenn. Ch. 438.

[27] Dudley v. Bachelder, 53 Me. 403. See, also, Cranston v. Smith, 6 R. I. 231; Farnham v. Clements, 51 Me. 426. See 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 365, it is laid down that a bill for the specific performance of a contract relating to land must allege the contract to be in writing, citing Redding v. Wilkes, 3 Brown, Ch. 400; Barkworth v. Young, 4 Drew. 1, and Wood v. Midgley, 5 De Gex, M. & G. 41; but the decisions in this country seem to uphold the conclusions stated in the text.

that, while the bill need not allege the contract to have been in writing, it must not, on the other hand, show it to have been by parol, as the effect of the rule is that, the matter being stated as it would have been if no statute existed, it will be presumed to comply with the statutory requirements as to the method of performance.

On the other hand, the converse of the rule necessarily is that if the act or thing to be pleaded was unknown at common law, and is created by the statute, it must be pleaded with all the formality that the statute requires, and show a full compliance with its provisions.[28]

Description of Property.

It is a rule of necessity in all pleading that property which is the subject-matter of litigation must be described with sufficient certainty to properly inform the opposing party and the court as to the nature, quantity, or extent, and often the value of such property, according to what is material to the issues to be met and determined. Personal property must be described with sufficient accuracy, according to the attendant circumstances, to clearly identify it, and the same test is applied with regard to real estate, though, from the nature of the latter and the peculiar methods of description necessarily adopted, the degree of accuracy required is much greater. Thus, in a bill to quiet title to land, or in one to enforce the specific performance of a contract for the sale or purchase of land, the particular tract or lot intended to be designated must be clearly pointed out and described, or there can be no decree.

Matters Necessarily Implied.

A further rule of the common law qualifying the general requirement as to certainty is that, wherever material facts are necessarily implied from other facts, only such primary facts need be stated;[29] and the rule holds good in equity, provided the facts implied are the necessary and direct consequence of those stated, and are not to be assumed as a matter of mere inference or conjecture. Thus, where a conveyance by deed is alleged in a bill, it is unnecessary to aver that the deed was delivered,[30] and an alle-

[28] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 366.

[29] Shipman, Com. Law Pl. (2d Ed.) p. 431.

[30] Whitten v. Whitten, 36 N. H. 326.

gation that the complainant was the purchaser of the property claimed has been held to be a sufficient averment of a consideration for the purchase.[31] And it has been held in Alabama that an averment that a wife holds property to her separate use implies that it is an estate by contract, and not under the statute.[32]

This rule, however, will be of no assistance to a complainant whose statement of facts leaves the case where that which is sought to be supplied is left to mere inference or conjecture. Thus, where a bill entitled against the "Trustees of the Methodist Episcopal Church of the City of Trenton" contained neither allegations that the defendants were such trustees, nor that there was any such corporate body as the "Methodist Episcopal Church of the City of Trenton," nor made any statement as to the manner in which the trust they were charged with violating was committed to them, the bill was held demurrable, everything as to the incorporation of the church and the authority of the trustees being left to conjecture.[33]

Presumptions.

Another common-law rule applicable here is that it is unnecessary to allege what the law will presume;[34] that is, as legality in the transactions of persons is always presumed, and everything is taken as legally done until the contrary is shown, it is not necessary, in pleading performance of an act, to allege that it was legal and proper under the circumstances, as it will be presumed to have been so. Thus, innocence of criminal or fraudulent motives or acts, as well as capacity to contract, is always presumed as to any person whose acts or agreements are in question; and so a corporation is presumed to act within the scope of its corporate powers, and, in a bill on its behalf to enforce its rights under a contract, the fact that the making of the contract on its side was an

[31] Dunlap v. Gibbs, 4 Yerg. (Tenn.) 94.

[32] Cowles v. Morgan, 34 Ala. 535.

[33] Rainier v. Howell, 9 N. J. Eq. 121. See, also, Richards v. Richards, 98 Ala. 599, 12 South. 817; Perry v. Perry, 65 Me. 399; Search's Adm'r v. Search's Adm'rs, 27 N. J. Eq. 137; Kinney v. Mining Co., 4 Sawy. 438, Fed. Cas. No. 7,827; Foster v. Hill, 55 Mich. 540, 22 N. W. 30; Marye v. Root, 27 Fla. 453, 8 South. 636.

[34] Shipman, Com. Law Pl. (2d Ed.) p. 432.

act properly authorized under its charter need not be expressly stated, any objection on the ground that such act was ultra vires being matter of defense only. The presumptions which thus dispense with allegations of fact are not conclusive, however, and are to be distinguished from matters of mere inference from established facts, or, more properly speaking, from presumptions of fact, which, while dispensing with evidence, do not always affect the rule as to pleading.[35]

SAME—CONSEQUENCES OF UNCERTAINTY.

232. Uncertainty in the statements of the bill being generally a defect in form, and apparent upon its face, is ordinarily to be taken advantage of by demurrer, unless the case is one where a variety of circumstances, if proved, would warrant some relief, though improperly stated; but the fault may sometimes be cured by an allegation, in the same bill, explaining and justifying the failure to plead with greater certainty.

Want of proper certainty in the statements of the bill, being really a defect in form, and almost invariably apparent upon the face of the bill, is to be taken advantage of by demurrer,[1] unless the case is one where a great variety of circumstances support the complainant's case, the evidence of which might sustain the relief prayed for, or at least warrant some relief, as in the latter case there could not be, agreeably to the theory of the demurrer, a "neat, short point," amounting to an absolute denial of the complainant's title to any relief.[2] In this last case the remedy would be by a motion to make the allegation of the bill more certain.[3] And under some circumstances, as where a written instrument on which the complainant's case is founded is in the possession of the

[35] See Greenl. Ev. (15th Ed.) § 44; Button v. Frink, 51 Conn. 342. And see Stroehe v. Fehl, 22 Wis. 337.

§ 232. [1] Story, Eq. Pl. § 528.

[2] Brooke v. Hewitt, 3 Ves. 253.

[3] See Evansville & R. R. Co. v. Maddux, 134 Ind. 571, 34 N. E. 511; Conroy v. Construction Co., 23 Fed. 71; Johnson v. Machine Co., 25 Fed. 373.

defendant, an insufficient or inaccurate statement of the contents of such instrument would be cured by an allegation in excuse and justification, stating the fact of such possession, and the consequent inability of the complainant to make a more complete statement.[4]

SAME—CONSISTENCY AND DIRECTNESS.

233. The matters and allegations contained in the bill must be consistent with each other, and must justify the relief sought. Inconsistent or alternative statements will, in general, render the bill demurrable.

QUALIFICATION—While the complainant cannot, in general, set forth his title in the alternative, he may, in certain cases, frame his bill with a double aspect,—averring separate states of fact, of a different nature, when the title to relief would be the same upon both, and obtain, upon one or the other, the relief proper to be decreed; or stating all the facts, and praying relief in the alternative, as the court shall thereupon determine.

234. Whatever is essential to the rights of the complainant, and is necessarily within his own knowledge, must be alleged positively and precisely, and not by way of recital. Facts not within his knowledge, and charged as within the knowledge of the defendant, or which are necessarily to be so presumed, may be alleged upon information and belief; but in such case there must be an averment of the fact, and not a mere statement of the complainant's information and belief only.

Inconsistency or Repugnancy.

As inconsistent or repugnant statements necessarily tend to destroy or neutralize each other, the fault is one which prevents the framing of a complete and logical statement, upon which the court

[4] Wright v. Plumptre, 3 Madd. 481.

is to grant relief; and it is as objectionable in equity pleading as at common law. The rule is therefore as above stated, and a complainant will not ordinarily be permitted to advance inconsistent claims, nor to frame his statement of facts or his prayer in the alternative.[1] Thus, an action to set aside a transfer of certain personal property as fraudulent, in which the court is asked to adjudge the defendant's title to a vessel void, and which unites also a claim when the transfer is alleged to be valid, and the complainant to be entitled to relief on the theory of a subsisting joint interest with the defendant in the transfer in question, proceeds on different and repugnant grounds;[2] and so a creditors' bill seeking to condemn property alleged to have been fraudulently conveyed, and also to recover the money consideration for such conveyances.[3]

Bills with Double Aspect.

The strict rule that a complainant, with full knowledge of the facts, cannot seek alternative relief upon inconsistent grounds, has been qualified by the adoption of a practice permitting the use of what is known as a "bill with a double aspect." In cases where the complainant is in doubt as to what specific relief he is entitled to, he may frame his bill in the alternative, and obtain the relief which the facts stated may warrant.[4] The classes of cases in which this is done seem to be two in number: (1) Those where there are two or more separate states of fact, of a different nature, either of which would entitle the complainant to the same relief, in which case both are averred and the proper relief obtained upon one or the other;[5] and (2) those where the complainant, upon all the facts, is in doubt as to his rights, and sets forth all the facts, praying relief in the alternative, as the court shall thereupon determine. Thus, for example, a bill was held not

§§ 233–234. [1] Story, Eq. Pl. §§ 245, 245a, 246; Edwards v. Edwards, Jac. 335. See, also, Houghton v. Reynolds, 2 Hare, 264.

[2] Wilkinson v. Dobbie, 12 Blatchf. 298, Fed. Cas. No. 17,670.

[3] Caldwell v. King, 76 Ala. 149.

[4] Story, Eq. Pl. § 254; Lloyd v. Brewster, 4 Paige (N. Y.) 537. See, also, Colton v. Ross, 2 Paige (N. Y.) 396; Terry v. Rosell, 32 Ark. 478, 493; McConnell v. McConnell, 11 Vt. 290; Fisher v. Moog, 39 Fed. 665; Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771.

[5] Bennet v. Vade, 2 Atk. 324, 325.

obnoxious to the charge of repugnancy which sought to establish for an infant complainant either a partnership interest in certain waterworks, under a contract made with his father for his benefit, or a resulting trust on account of the investment of his money in said works by his father as guardian;[6] and so, where a complainant sought to set aside a deed on the ground of fraud and imposition and undue influence, he was allowed to charge insanity in the party making the deed, and also great weakness of mind.[7]

The grounds upon which relief is thus sought may be clearly inconsistent with one another, but the relief sought must, in either alternative, be consistent with the case made by the bill;[8] and, where two separate and inconsistent states of fact are presented, it seems that, to justify a bill in this form, the case should be one where the relief upon each state of facts would be the same.[9]

Ambiguity.

The rule as to ambiguous pleading is the same in equity as at common law, and founded upon the same reason.[10] The complainant is therefore prohibited from stating his claim in such a manner as to render it entirely uncertain what he means to allege, and, in the construction of his statement as presented, a rule of general application will be followed; and, of two different meanings which are presented, that construction will be adopted which is most unfavorable to him. The rule of construction here is the one applicable at common law, a pleading in equity being taken most strongly against the party offering it;[11] and, while the statement objected to may be susceptible of several meanings, it will generally be unobjectionable if its true meaning can be ascertained, according to reasonable intendment and construction, though it is not worded with absolute precision.

[6] Stein v. Robertson, 30 Ala. 286.

[7] Bennet v. Vade, 2 Atk. 324, 325.

[8] Colton v. Ross, 2 Paige (N. Y.) 396.

[9] Story, Eq. Pl. § 254.

[10] As to the common-law rule, see Shipman, Com. Law Pl. (2d Ed.) p. 407.

[11] Lockard v. Lockard, 16 Ala. 423. See Birly's Ex'rs v. Staley, 5 Gill & J. (Md.) 432; Surget v. Byers, Hempst. 715, Fed. Cas. No. 13,629.

Argumentative Pleading.

Argumentative pleading is always objectionable, as the pleadings proper in equity are a statement of facts only, and should set forth the matters pleaded in a direct and positive manner, and not leave them to be collected by inference or argument. Under this rule, a complainant would not be permitted to state an affirmative position of fact by alleging two negatives, nor a negative one by two affirmatives; and the reason of the rule, while not identically the same as at common law, where precision was required in order that the adverse party might be enabled to traverse such allegations by a direct and distinct denial, is based upon a similar consideration,—the information of the defendant, so that he may be in a position to make a proper answer.

Alternative Pleading.

We have already seen that, in certain cases, bills may be framed with a double aspect, in order to save the complainant's rights in cases where he is in doubt as to what relief he is entitled to,[12] and that otherwise he cannot present allegations which are inconsistent, and pray alternative relief upon one or the other. A similar rule prohibits, in the framing of his allegations, the use of a hypothetical or alternative form, such as alleging generally the performance of a number of acts, where the acts imposed are in the alternative or disjunctive, and this method of statement would therefore leave the court and the defendant without definite information as to what was meant.

Direct and Positive Statements.

A rule of equity pleading, which is one of the most prominent of the system, is that the complainant must state all facts which are, or are to be necessarily presumed to be, within his own knowledge, directly and positively;[13] and the principle is the same as that underlying all of the rules relative to the substantial allegations of the bill,—the information of the defendant. Thus, a bill brought to charge a defendant as assignee of a lease was held insufficient in stating only that the complainant had been informed

[12] Ante, p. 334.

[13] Story, Eq. Pl. § 255; Coop. Eq. Pl. 6.

by his steward that the defendant was such assignee, the fact being essential to the claim set up by the bill.[14]

Pleading According to Legal Effect.

A rule of the common-law system provides that written instruments or other matters set forth in pleading must be stated according to their legal effect or operation, and not according to their terms or form,[15] and, while this rule has not been literally adopted under the chancery method, the underlying principles have been recognized both in England[16] and this country;[17] and the present rule in equity procedure seems to be that a written instrument must be pleaded according to its legal effect, and without setting out more than is material to the matter in controversy, except, perhaps, where the questions at issue involve the construction of the true meaning of the instrument itself.[18]

SAME—MULTIFARIOUSNESS.

235. The bill must not be multifarious.

236. In general, multifariousness may be defined as the improper joinder, in the same bill, of several distinct, independent claims for equitable relief. The fault may also consist in the improper joinder of complainants having distinct demands or claims, or the demand of several matters of a distinct and independent nature against several defendants where the interest and liability of each defendant is distinct and separate from that of the others.

237. The fault may thus arise either by

(a) Misjoinder of causes of action (p. 339).

(b) Misjoinder of parties complainant (p. 343).

(c) Misjoinder of parties defendant (p. 344).

[14] Lord Uxbridge v. Staveland, 1 Ves. Sr. 56.

[15] Shipman, Com. Law Pl. (2d Ed.) 459–461.

[16] 1 Daniell, Ch. Pl. & Prac. 363.

[17] Equity Rule 26.

[18] 1 Daniell, Ch. Pl. & Prac. 363, 364; post, p. 500.

238. In the first class the fault will not exist unless two things concur:

(a) The different grounds stated must be wholly distinct from and independent of each other; and

(b) Each ground of relief stated must of itself be a complete cause of suit, and sufficient of itself to sustain a bill.

QUALIFICATION—If one of the grounds for relief stated is, upon its face, wholly without the jurisdiction of equity, the court may disregard it.

239. Whether the bill is multifarious by reason of a misjoinder of parties will depend, in general, upon the relation in which the parties stand to the subject-matter in controversy, or to each other.

Multifariousness in General.

If a bill is what is technically termed multifarious, it will be demurrable, and may be dismissed by the court of its own motion, even if the defendant makes no objection.[1] The term is applied, as we shall presently explain, to three different conditions, but seems more properly applicable to the first,—that of a misjoinder of causes of action in the bill; the other two being more aptly designated as misjoinder of parties. As used, it includes all three, and seems to be also applied when the bill is defective by improperly uniting several prayers for relief,[2] though the stating and charging parts must then also be objectionable. The fault in cases of the first class is analogous to that of duplicity at common law, and is prohibited for a similar reason, as it tends to impose upon a defendant the necessity of answering more than he should be required to meet in the particular suit, and, when there are several defendants, to place upon each a liability for costs, and for answering to matters with which he has no connection whatever, and as to which he may have no knowledge.[3] Courts of equity will not

§§ 235–239. [1] Greenwood v. Churchill, 1 Mylne & K. 546, 559.

[2] If the stating and charging parts of the bill are not multifarious, the prayer will not make it so. Burchard v. Boyce, 21 Ga. 6; Hammond v. Bank, Walk. (Mich.) 214.

[3] Mitf. Eq. Pl. 181. See Ward v. Duke of Northumberland, 2 Anstr. 469;

permit a complainant to thus enlarge his pleading, either as to claims or parties, and the existence of the fault in any form will render the bill demurrable.[4]

As the test adopted in each case depends upon the structure and allegations of the bill, no general rule can be laid down as to what will constitute this fault; and the question as to whether it exists must be determined, for the most part, by the court, in the exercise of its discretion.[5] A summary of the definitions given has been stated substantially as follows: In order to sustain a demurrer for multifariousness, it should appear either that several matters, perfectly distinct and independent, are joined in the bill against the same defendant, thus compelling him to unite in his answer different matters, wholly inconsistent with each other; or that the bill contains the demand of several matters, of a distinct and independent nature, against several defendants, thus imposing upon each of them the costs incident to the test of several claims against the other defendants, with which he has no connection, and in which he may have no interest. Hence (in the last case) the objection should be confined to cases in which the demand against each particular defendant is entirely distinct and separate in its subject-matter from that in which the other defendants are interested, and does not apply where there is a common liability in the defendants, and a common, though not necessarily a co-extensive, interest in the complainants.[6]

Same—Misjoinder of Causes of Action.

The form of multifariousness most resembling duplicity at common law, and to which the technical term of equity seems most properly applicable, is that where the fault lies in improperly uniting in the bill two or more distinct causes of suit against the same

Whaley v. Dawson, 2 Schoales & L. 367, 371; West v. Randall, 2 Mason, 201, Fed. Cas. No. 17,424; Brinkerhoff v. Brown, 6 Johns. Ch. (N. Y.) 139; White v. White, 5 Gill (Md.) 381.

[4] Ward v. Cooke, 5 Madd. 122; Whaley v. Dawson, 2 Schoales & L. 367, 370; Benson v. Hadfield, 4 Hare, 32. Unless the fault appears on the face of the bill, it will generally be disregarded. Edwards v. Sartor, 1 S. C. 266, 268; post, p. 393.

[5] Warren v. Warren, 56 Me. 360; Eastman v. Bank, 58 N. H. 421.

[6] Fiery v. Emmert, 36 Md. 464. See, also, Petty v. Fogle, 16 W. Va. 497.

defendant or defendants,—a method of pleading which is obnoxious to the theory of the equity system in combining inconsistent and unconnected matters in the same bill, requiring separate and inconsistent answers, and tending to confusion and prolixity in the pleadings. As has been stated, the question in each case is one of fact, to be determined by the court in the exercise of its discretion; but, in general, objection on this ground will not be sustained unless two things concur: (1) The different grounds of suit must be wholly distinct from and independent of each other, and not such as arise out of the same transaction or series of transactions, forming one course of dealing, and all tending to one end, and of which one connected story can be told;[7] and (2) each ground must be a complete cause of action in itself, and sufficient of itself to sustain a bill.[8] If the suit is for a single object, to which the prayer is directed, it will not be objectionable under the rule, by reason of allegations seeking merely to negative an anticipated defense,[9] nor because of an improper charge which does not of itself set up an independent cause of action.[10]

As the rule is thus one of convenience only, the objection being tested by the structure of the bill, it can best be illustrated by examples, and the following are given as instancing cases where the objection was sustained under this head: A bill uniting claims against a defendant as heir, and in his individual capacity;[11] a bill seeking to redeem from a mortgage of an entire estate, and a subsequent mortgage by one tenant in common of his share in a part of the estate;[12] a bill for specific performance, charging that the land was paid for in money, and also charging such payment in hogs;[13] a bill praying for the enforcement of an award, and, as

[7] Bedsole v. Monroe, 5 Ired. Eq. (N. C.) 313. See Rosenstein v. Burns, 41 Fed. 841.

[8] Story, Eq. Pl. § 271. The matters alleged must each be of a character to entitle the complainant to equitable relief. McCabe v. Bellows, 1 Allen (Mass.) 269; Pleasants v. Glasscock, 1 Smedes & M. Ch. (Miss.) 17; Many v. Iron Co., 9 Paige (N. Y.) 188.

[9] Ware v. Curry, 67 Ala. 274.

[10] Pyles v. Furniture Co., 30 W. Va. 123, 2 S. E. 909.

[11] Bryan v. Blythe, 4 Blackf. (Ind.) 249.

[12] White v. Curtis, 2 Gray (Mass.) 467.

[13] Wilkson v. Blackwell, 4 Mo. 428.

an alternative, to have a partition, concerning which the award was made, declared unequal or fraudulent, and to adjust the shares of the parties entitled;[14] a bill joining demands against the defendant as administrator and in his private capacity;[15] a bill seeking to enforce a vendor's lien against the personal representatives of the purchaser, and also to establish a devastavit against them for misrepresenting complainant's claim in the land;[16] where a bill sought an injunction to prevent proceedings by the defendant as to certain personal property, claiming that the title thereto had been previously adjudicated and settled, and also claiming a statutory right to have the title or claim of defendant tried and determined;[17] where a bill by stockholders, against a corporation and others, charged (1) an illegal issue of preferred stock, (2) a breach of trust by a fraudulent issue of full-paid stock for a nominal consideration, and (3) an illegal purchase of a lottery grant;[18] and where a bill sought a foreclosure and sale of land, an accounting, and the specific performance of an agreement to convey.[19]

In the following cases the bill was held not multifarious under this objection: Where it sought to foreclose a mortgage upon an entire tract of land, and prayed for a specific performance as to

[14] Emans v. Emans, 14 N. J. Eq. 114. See, also, Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 10 Sup. Ct. 965.

[15] Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199. See, also, Jones v. Foster, 50 Miss. 47.

[16] Kinsey v. Howard, 47 Ala. [illegible].

[17] Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co., 43 Fed. 545.

[18] Lewarne v. Improvement Co., 38 Fed. 629.

[19] Brown v. Safe-Deposit Co., 128 U. S. 403, 9 Sup. Ct. 127. See, also, as further instances, Rhode Island v. Massachusetts, 14 Pet. 210; Price v. Coleman, 21 Fed. 357; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Fed. 440; Reed v. Reed, 16 N. J. Eq. 248; Belt v. Bowie, 65 Md. 350, 4 Atl. 295; Fougeres v. Murbarger, 44 Fed. 292; McDonnell v. Eaton, 18 Fed. 710; Gaines v. Chew, 2 How. 619; Chapin v. Sears, 18 Fed. 814; Shickle v. Foundry Co., 22 Fed. 105; Darcey v. Lake, 46 Miss. 109; Winsor v. Bailey, 55 N. H. 218; Gordon's Adm'r v. Ross, 63 Ala. 363; Robinson v. Robinson, 73 Me. 170; Lenz v. Prescott, 144 Mass. 505, 11 N. E. 923; Carmichael v. Browder, 3 How. (Miss.) 252; Jones v. Foster, 50 Miss. 47; Junkins v. Lovelace, 72 Ala. 303; Conner v. Smith, 74 Ala. 115; Columbus Banking & Ins. Co. v. Humphries, 64 Miss. 258, 1 South. 232; Universal Life Ins. Co. v. Devore, 83 Va. 267, 2 S. E. 433.

one-half of the land from the heirs of the vendor of the mortgagee;[20] where a complainant claimed one general right to property in the possession of two defendants, although such right was derived from distinct sources;[21] where it was filed to enforce the payment of a judgment at law, and sought to remove fraudulent conveyances and incumbrances, and also to bring within the reach of the judgment equitable interests, not the subject of executions at law;[22] where it alleged title to the same fund in two different rights, as administrator and as next of kin.[23] So, when a bill to recover lands is as to all the lands, by the same parties against the same parties, and as to the same subject-matter, the complainant has the right to unite his entire demands in a single suit;[24] and when a bill for the dissolution and winding up of a partnership alleged violation of the partnership agreement by a defendant parther, and that the complainant was induced to enter into such agreement through the defendants' misrepresentations, it was held that although several grounds of relief were stated, as all arose out of the same series of transactions, and related to the same subject-matter, and could be conveniently settled in one suit, the bill was not multifarious;[25] and if the bill should contain several matters, all of which may come into consideration as prayed for (as in the case of an account), although relief may ultimately be given as to

[20] Holman v. Bank, 12 Ala. 369.

[21] Nail v. Mobley, 9 Ga. 278.

[22] Way v. Bragaw, 16 N. J. Eq. 213.

[23] Fairly v. Priest, 8 Jones, Eq. (N. C.) 21. But see Blease v. Burgh, 2 Beav. 221. And see Jones v. Foster, 50 Miss. 47.

[24] Ferry v. Laible, 27 N. J. Eq. 146.

[25] Rosenstein v. Burns, 41 Fed. 841. See, also, Board of Sup'rs of Douglas Co. v. Wallbridge, 38 Wis. 179. See, also, as further instances of bills held not multifarious, Durling v. Hammar, 20 N. J. Eq. 220; Gillespie v. Cummings, 3 Sawy. 259, Fed. Cas. No. 5,434; Richardson v. Brooks, 52 Miss. 118; Baird v. Jackson, 98 Ill. 78; Stafford Nat. Bank v. Sprague, 19 Blatchf. 529, 8 Fed. 377; De Wolf v. Manufacturing Co., 49 Conn. 282; Gordon v. Harvester Works, 23 Fed. 147; Hale v. Railroad Co., 60 N. H. 333; Hill's Adm'r v. Hill, 79 Va. 592; Handley v. Heflin, 84 Ala. 600, 4 South. 725; Jaynes v. Goepper, 147 Mass. 309, 17 N. E. 831. The joinder of several property owners to restrain the collection of a tax is not a misjoinder. Mt. Carbon Coal & Railroad Co. v. Blanchard, 54 Ill. 240.

some of them only, the bill will not be open to objection for multifariousness.[26]

Qualification—Disregarding Objectionable Grounds.

A qualification, or perhaps, more properly, an exception, is recognized, under the rule forbidding a misjoinder of causes of action, in cases where a bill states two distinct and complete causes, one of which is totally outside the jurisdiction of the court, as shown by the statement in the bill. In such a case the court may regard only the matter over which it has jurisdiction, and proceed with the suit as if but one ground for relief is stated in the bill,[27] always provided that the two are wholly disconnected and independent.

Misjoinder of Complainants.

While, as has been stated, the question of multifariousness generally is one of fact, it is a rule of limitation as to the parties named as complainants in the bill that only those who have a common interest or right in the subject-matter in controversy, and consequently to the relief sought, can be thus joined; those who assert distinct and independent claims cannot.[28] Thus, if two persons should assert a joint and also a several demand in the same bill, against the same defendant, a demurrer would lie;[29] and where two or more complainants file a joint bill to enforce their rights under distinct promissory notes given to each severally,[30] or to recover back moneys paid by each severally on distinct notes given by each to the defendants;[31] and so a bill by five several occupants of houses in a town, to enjoin the erection of a steam engine, on the ground that it would be a nuisance, was held objectionable, the rights of each being distinct.[32]

The test established as to multifariousness of this character is the want of interest on the part of those whose joinder is objected

[26] Addison v. Walker, 4 Younge & C. 442.

[27] Knye v. Moore, 1 Sim. & S. 61; Varick v. Attorney General, 5 Paige (N. Y.) 137. See, also, Hickey v. Railroad Co., 6 Ill. App. 172.

[28] Shackell v. Macaulay, 2 Sim. & S. 79; Exeter College v. Rowland, 6 Madd. 94; Yeaton v. Lenox, 8 Pet. 123.

[29] Harrison v. Hogg, 2 Ves. Jr. 323.

[30] Story, Eq. Pl. § 279.

[31] Yeaton v. Lenox, 8 Pet. 123.

[32] Hudson v. Maddison, 12 Sim. 416.

to, and it seems that there must be a common interest in all who are to be joined as complainants, though this interest need not be co-extensive.[33] All or none of the complainants must be entitled to recover;[34] and, in general, two or more persons cannot be joined as complainants where one has no standing in court, or where they set up antagonistic causes of action, or where the relief for which they respectively pray in regard to a portion of the property sought to be reached involves totally distinct questions, requiring different evidence, and leading to different decrees.[35]

If the community of interest exists, all persons so connected may join as complainants, and this has been allowed in cases where the bill united several distinct and independent matters, owing to the necessity of disposing of all in the particular proceeding, and preventing a multiplicity of suits,[36] though the general rule we have considered prohibits such joinder. And, so long as all joined as complainants are interested in the suit, it is not necessary that the interest of each be co-extensive with that of others. Thus, a tenant for life and a remainder-man may join as complainants in the same suit respecting their interest in the estate;[37] and a widow and her children, who have successive interests in the same trust, may unite in one bill to enforce the trust, when there has been a breach, as well against a stranger as against the trustee.[38]

Misjoinder of Defendants.

"What is more familiarly understood by the term 'multifariousness,' as applied to a bill, is where a party is able to say he is brought as defendant upon a record, with a large part of which, and of the case made by which, he has no connection whatever."[39]

[33] Buckeridge v. Glasse, 1 Craig & P. 126; Fiery v. Emmert, 36 Md. 464.

[34] Butler v. Gazzam, 81 Ala. 491, 1 South. 16.

[35] Walker v. Powers, 104 U. S. 245. And see, further, as to misjoinder of complainants, Jones v. Foster, 50 Miss. 47; Walker v. Powers, 104 U. S. 245; Mobile Sav. Bank v. Burke, 94 Ala. 125, 9 South. 328. Cf. Murray v. Hay, 1 Barb. Ch. (N. Y.) 59; Juzan v. Toulmin, 9 Ala. 662; Mt. Carbon Coal & R. Co. v. Blanchard, 54 Ill. 240.

[36] See Attorney General v. Borough of Poole, 4 Mylne & C. 17; Campbell v. Mackay, 1 Mylne & C. 603.

[37] Story, Eq. Pl. § 279a.

[38] Buckeridge v. Glasse, 1 Craig & P. 126.

[39] Per Lord Cottenham, in Campbell v. Mackay, 1 Mylne & C. 603, 618. And see Waller v. Taylor, 42 Ala. 297.

The largest class of cases under the head of multifariousness is that where the objection has been taken on the ground of the improper joinder of defendants, and though the question, as in other cases of misjoinder, is to be determined by reference to the structure of the bill, the test generally followed is the want of a common interest or liability on the part of the defendants thus joined. Under this test, the fault has been generally held to exist where the bill contained a demand of several matters of a distinct and independent nature, against several defendants, and the demand against each particular defendant was entirely distinct and separate in its subject-matter from that in which other defendants were interested;[40] that is, where a separate and distinct case, properly determinable by itself, is made against each defendant, to no portion of which is the joinder of any of the other defendants necessary.[41] The interest in the subject-matter which is necessary, however, need not be one by all the defendants in all the matters involved in the suit, it being sufficient to warrant a joinder where each person has an interest in some of such matters, and they are connected with the others.[42]

The rule is best illustrated by instances. If a purchaser of an equity of redemption under a contract of sale should file a bill for a specific performance, he could not properly join the mortgagee in such bill, nor any third person claiming an interest in the equity of redemption, who had not joined in the contract, the contract regulating the liabilities of the parties, and third persons being strangers to it.[43] So, if an estate should be sold in different lots to several different persons, there should be a separate bill against

[40] Story, Eq. Pl. §§ 271, 271a. Attorney General v. Mayor, etc., of Borough of Poole, 4 Mylne & C. 17; Fiery v. Emmert, 36 Md. 464; Petty v. Fogle, 16 W. Va. 497. See, also, Brinkerhoff v. Brown, 6 Johns. Ch. (N. Y.) 139; Fellows v. Fellows, 4 Cow. (N. Y.) 682.

[41] Attorney General v. Mayor, etc., of Borough of Poole, 4 Mylne & C. 17; Turner v. Robinson, 1 Sim. & S. 313. The cases where unconnected parties are allowed to be joined in a suit are where there is one common interest among them all, centering in the point in issue in the cause. Ward v. Duke of Northumberland, 2 Anstr. 469.

[42] Addison v. Walker, 4 Younge & C. Exch. 444; State v. Brown, 58 Miss. 835; Lenz v. Prescott, 144 Mass. 505, 11 N. E. 923.

[43] Tasker v. Small, 3 Mylne & C. 63.

each purchaser, the rights of each being distinct and unconnected;[44] and where a bill was brought against a corporation to establish eight charitable bequests, of which seven were for the benefit of poor members of the corporation exclusively, and the eighth was subject to a fixed payment to another corporation, the bill was held multifarious, for the reason that the latter corporation had no interest in the other seven charities.[45] A bill for a partition, asking a division of several distinct tracts of land, not held by the same tenants in common, and which blended, in one, independent causes of action, to which the same persons were not parties, was held multifarious.[46] A bill is demurrable which charges several different defendants with fraud, without alleging a common scheme to defraud, or a common interest;[47] and so where a bill set out three separate causes of action, in which all the defendants did not have a common interest.[48] A suit for specific performance against one person cannot join as defendant another against whom a partnership settlement is sought.[49]

On the other hand, bills have been held not multifarious, though several were joined as defendants, in the following cases: A bill for an account, alleging a breach of trust, and joining as defendant a party in possession of assets under the breach;[50] a bill to have certain notes, all made by the complainant and delivered to the defendants, canceled and delivered up, and joining as defendants the several persons holding such notes;[51] a bill seeking to set aside fraudulent conveyances by an intestate, and joining, as defendants, the heirs and administrator of the intestate and all interested in the fraudulent transactions;[52] a bill brought by a creditor against a debtor and his grantees for the purpose of setting aside a number of voluntary conveyances, severally made to each of such gran-

[44] Coop. Eq. Pl. 182. See Brookes v. Lord Whitworth, 1 Madd. 86; Lumsden v. Fraser, 7 Sim. 555.

[45] Attorney General v. Merchant Tailors' Co., 1 Mylne & K. 189.

[46] Simpson v. Wallace, 83 N. C. 477.

[47] Bobb v. Bobb, 8 Mo. App. 257. See, also, Almond v. Wilson, 75 Va. 613.

[48] Sanborn v. Dwinell, 135 Mass. 236.

[49] Bayzor v. Adams, 80 Ala. 239.

[50] Melton v. Withers, 2 S. C. 561.

[51] Garrett v. Railroad Co., 1 Freem. Ch. (Miss.) 70.

[52] Snodgrass v. Andrews, 30 Miss. 472.

tees;[53] a bill filed against executors, denying their authority to act as such, and to recover property sold by them as such, and joining the purchasers of such property as co-defendants;[54] and where the complainants in a bill in equity have a common interest in all the matters comprised in the bill, and the defendants are concerned only in a portion of the subject-matter, the objection of multifariousness as a ground of demurrer is within the discretion of the court, which may allow the bill to stand if it be convenient and expedient to try the whole matter in one case.[55]

Consequences of Multifariousness.

As this defect is one which, in the nature of things, must ordinarily appear on the face of the bill, the remedy is generally by demurrer;[56] but if a bill is so framed that the ground of objection, while actually existing, is not thus apparent, advantage may be taken by plea,[57] or probably by answer. In general, so far as the parties are concerned, the defect will be treated as waived, unless noticed under one or the other of these modes, and will not be considered at the hearing on motion of a party who might previously have objected;[58] but a waiver will not be implied in all cases, as the court may, of its own motion, dismiss the bill when no objection has been made by the defendant,[59] as it is not, in the

[53] Williams v. Neel, 10 Rich. Eq. (S. C.) 338. See, also, Planters' & Merchants' Bank of Mobile v. Walker, 7 Ala. 926; Chase v. Searles, 45 N. H. 511; Randolph v. Daly, 16 N. J. Eq. 313; Bartee v. Tompkins, 4 Sneed (Tenn.) 623.

[54] Gaines v. Chew, 2 How. 619. See, also, Horton v. Sledge, 29 Ala. 478; Worthy v. Johnson, 8 Ga. 236; Bugbee v. Sargent, 23 Me. 269; Martin v. Martin, 13 Mo. 36; Camp v. Mills, 6 Jones, Eq. (N. C.) 274; Bissell v. Beckwith, 33 Conn. 357; Richards v. Pierce, 52 Me. 560.

[55] Carroll v. Roosevelt, 4 Edw. Ch. (N. Y.) 211.

[56] Story, Eq. Pl. §§ 284a, 530–540; Ward v. Cooke, 5 Madd. 122; Wynne v. Callander, 1 Russ. 293; Benson v. Hadfield, 4 Hare, 32.

[57] Story, Eq. Pl. § 747.

[58] Ward v. Cooke, 5 Madd. 122; Wynne v. Callander, 1 Russ. 293; Whaley v. Dawson, 2 Schoales & L. 367, 370. The cases in which the objection of multifariousness has been overruled at the hearing are cases where the questions united are so blended together that the court will deal with them as presented, though the joinder is, strictly, improper. See Hoggart v. Cutts, 1 Craig & P. 204.

[59] Greenwood v. Churchill, 1 Mylne & K. 546. See Nelson v. Hill, 5 How. 127.

latter case, bound to allow any form of bill which the complainant may choose to present.

SAME—SCANDAL.

240. Scandal in the bill is matter stated therein which is wholly improper for the court to hear, or for any pleading to show, or which unnecessarily casts upon another the imputation of disgraceful or criminal conduct. Nothing relevant to the merits of the controversy, however objectionable in other respects, can be so considered.

A branch of the general rule forbidding all unnecessary and redundant matter in the complainant's statement is that which prohibits the allegation of matter which it would be unbecoming in the court to hear, or the presence of which in the bill would be an impropriety in the complainant, or which unnecessarily imputes to another disgraceful or criminal conduct.[1] Thus, allegations contrary to decency and good manners, or which go outside the issues in the cause to make an unnecessary attack upon the personal character of a defendant, would ordinarily be considered scandalous. The existence of the fault is subject, however, in all cases, to the test of the relevancy or immateriality of the matter in question, as matter which is relevant to the merits of the controversy, however objectionable in other respects, will not be considered scandalous.[2] Thus, charges of fraud or immorality, if necessary in the statement of the complainant's case, will not be deemed scandalous,[3] nor disparaging and abusive statements regarding the defendant, if the latter are not also immaterial.[4]

§ 240. [1] 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) § 347. Scandal in the pleadings in equity was expressly prohibited by one of the English orders in chancery (Beame, Orders Ch. 165–167), and in the United States by the twenty-sixth equity rule. See, also, Wyatt, Pract. Reg. 57, 58; Ex parte Simpson, 15 Ves. 476; Christie v. Christie, 8 Ch. App. 499; Woods v. Morrell, 1 Johns. Ch. (N. Y.) 103; Hood v. Inman, 4 Johns. Ch. (N. Y.) 437.

[2] Story, Eq. Pl. § 269; Fisher v. Owen, 8 Ch. Div. 645; Gleaves v. Morrow, 2 Tenn. Ch. 592; and the cases cited in the two succeeding notes.

[3] Coop. Eq. Pl. 19. See Fenhoulet v. Passavant, 2 Ves. Sr. 24; Coffin v. Cooper, 6 Ves. 514; Ex parte Simpson, 15 Ves. 477.

[4] Henry v. Henry, Phill. Eq. (N. C.) 334. See, also, Desplaces v. Goria,

Scandal in the bill is not the subject of a demurrer, but will, in general, cause the bill to be referred to a master for examination, and, if found to contain scandalous matter, the court will order such matter expunged,[5] and may also, it seems, take the same course of its own motion.[6]

SAME—IMPERTINENCE.

241. Impertinence in the bill consists in the allegation of matter wholly outside of and irrelevant to the merits of the complainant's demand. Scandalous matter is always impertinent, but matter may be impertinent without being scandalous; and, in general, nothing will be deemed impertinent which is in any way material to the subject-matter of the controversy, the relief sought, or the costs.

While the above definition seems sufficiently comprehensive to indicate the nature of this fault, impertinence has also been defined as the introduction of any matters into a bill, answer, or other pleading or proceeding in a suit, which are not properly before the court for decision at any particular stage of the suit.[1] In other words, the bill will be open to exception if it contains matters not material to the suit, or, if material, which are not in issue, or which, if both material and in issue, are set forth with great and unnecessary prolixity.[2] As in the case of scandalous matter, the fault was prohibited by one of the English "Orders in Chancery," [3] which has been followed by the United States supreme court in framing

1 Edw. Ch. (N. Y.) 350; Goodrich v. Parker, 1 Minn. 169 (Gil. 195); Sommers v. Torrey, 5 Paige (N. Y.) 54; Reeves v. Baker, 13 Beav. 436. As to allegations not scandalous, see Everett v. Prythergch, 12 Sim. 363, 365.

[5] Story, Eq. Pl. § 270. This is provided for in federal practice by Eq. Rules 26 and 27. See, also, Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 343; Johnson v. Tucker, 2 Tenn. Ch. 244.

[6] Coffin v. Cooper, 6 Ves. 514; Williams v. Douglas, 5 Beav. 82.

§ 241. [1] Wood v. Mann, 2 Sumn. 316, Fed. Cas. No. 17,953. See, also, Langdon v. Goddard, 3 Story, 13, Fed. Cas. No. 8,061.

[2] Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 343; Woods v. Morrell, 1 Johns. Ch. (N. Y.) 103.

[3] VIII. Con. Ord. in Chancery.

the "Equity Rules";[4] and, to prevent it, the same guaranty, viz. the signature of counsel, was and is still required.

According to the definitions given, the test most often to be applied to determine as to whether the pleading is objectionable is whether the matter in question is pertinent or relevant to the particular controversy. Thus, in a suit by trustees under a will to recover for waste committed by their lessee, a statement of the will, the testator's death, and the probate of the will and assumption of the trust by the trustees, has been held not impertinent, and, in the same case, an allegation that the trees cut were appurtenant to a house erected by the testator as a country residence, as ornamental trees, was held proper, as also a statement of the estimation in which such trees were held by the testator; but a statement of the opinion of the complainants was held impertinent.[5] In applying this test, however, it is to be remembered that a bill in chancery is not only a pleading to present to the court the material facts and allegations which uphold the complainant's claim, but it is also, in many cases, an examination of the defendant on oath, to obtain evidence to establish the complainant's case, or to disprove that of the defendant. The complainant may therefore state any matter of evidence in the bill, or any collateral fact, the admission of which by the defendant may be material in establishing the general allegations of the bill as a pleading, or in ascertaining and determining the nature, extent, and kind of relief to which the complainant may be entitled consistently with the case made by the bill, or which may legally influence the court in determining the question of costs. Where any allegation or statement of the bill may thus affect the decision of the cause, if admitted or proved, it is relevant, and cannot be excepted to as impertinent.[6]

Again, where matters which, while not foreign to the suit, are not in issue, or, if both material and in issue, are set forth with great and unnecessary prolixity, the fault will arise, and, in the latter case, from the method of statement only. Thus, a deed should properly be pleaded according to its legal effect; and, if

[4] Eq. Rule 26.

[5] Hawley v. Wolverton, 5 Paige (N. Y.) 522.

[6] Id.

also set out in hæc verba in a schedule annexed to the bill, the schedule may be stricken out as impertinent.[7] And so, also, both according to the general practice of chancery and under the equity rule, deeds should not be set forth in hæc verba, but only so much should be stated as is material to the point in controversy.[8]

As a necessary consequence of the nature of the two faults we have just considered, it is obvious that matter which is technically scandalous must, of necessity, be impertinent also; but the converse of this is not true, and matter which is clearly irrelevant, or which is objectionable by reason of a detailed or intricate statement, is not necessarily scandalous, the term "impertinent" being used as opposed to "pertinent," and not as expressive of any impropriety in the matter alleged or the manner of alleging it.

SAME—CONSEQUENCES OF SCANDAL OR IMPERTINENCE.

242. Scandalous or impertinent matter is never open to demurrer, but must be met by an exception or exceptions upon the particular ground, and will, where such exceptions are sustained, be expunged by order of court; or it may, in a proper case, be stricken out by the court of its own motion.

Scandal and impertinence in the bill are not faults which can be taken advantage of by demurrer, since the objection to be taken by the latter does not exist, the fault being one of overstatement or impropriety of statement, and not one of legal insufficiency in the allegations made. The method of procedure by a defendant who opposes the bill on either ground is by filing exceptions to the bill, specifying the objection and its grounds. According to the practice of the federal courts, which is believed to be the general practice of chancery, the method is then to refer the question to a master in chancery, and, upon a report by him finding the existence of one or both these faults, for the court to order that the objectionable matter be stricken out;[1] but the court must be fully

[7] Goodrich v. Parker, 1 Minn. 169 (Gil. 195).

[8] Hood v. Inman, 4 Johns. Ch. (N. Y.) 437.

§ 242. [1] See the twenty-sixth and twenty-seventh equity rules. Tench v. Cheese, 1 Beav. 571.

satisfied before an order to this effect will be granted,[2] though it seems that, if the matter be allowed to stand, the court may set the matter right in point of costs.[3]

[2] Davis v. Cripps, 2 Younge & C. Ch. 430, 443. See, also, Attorney General v. Rickards, 6 Beav. 444.

[3] Davis v. Cripps, 2 Younge & C. Ch. 430, 443. See, also, Emerson v. Dallison, 1 Ch. Rep. 103; Willis v. Evans, 2 Ball & B. 225, 229.

CHAPTER V.

THE DISCLAIMER.

243–245. Definition, Nature, and Use.

DEFINITION, NATURE, AND USE.

243. A disclaimer is a written statement by the defendant, disclaiming or disavowing and renouncing all interest in or claim to the subject-matter set forth in the complainant's bill.[1]

244. In cases where the bill merely alleges an interest in a defendant, without stating the particulars of such interest, a disclaimer alone will be sufficient; but, where the bill alleges other facts showing an apparent liability on the part of the defendant, the disclaimer must be accompanied by an answer, as the complainant may often be entitled to such answer to ascertain whether the defendant is actually without interest; and, while a defendant can disclaim an interest, he cannot, by such disclaimer, relieve himself from liability.

245. It may be used in conjunction with a demurrer, plea, or answer, or all of such methods, provided each method refers to a distinct part of the bill.

The disclaimer may be properly ranked as the first method of defense, as the obvious course for one who is made a party defendant, but who neither has an interest in nor is liable with respect to the subject-matter of the suit, is to at once free himself from all connection with the suit, and from all liability for costs.[2] It

§§ 243–245. [1] Story, Eq. Pl. §§ 838–842. See, also, Coop. Eq. Pl. 309; Ford v. Earl of Chesterfield, 16 Beav. 516, 520; Crane v. Deming, 7 Conn. 393; Bentley v. Cowman, 6 Gill & J. (Md.) 152.

[2] Story, Eq. Pl. §§ 838–842. Where a disclaimer is properly filed, the bill will usually be dismissed, with costs. Finch v. Martin, 19 Ill. 105, 111; Kan-

is distinct in substance from an answer, though sometimes confounded with it,[3] and is a formal written pleading, disclaiming or disavowing and renouncing all interest in or claim to the subject-matter placed in controversy by the bill.[4]

For the reason that it must generally be accompanied by an answer, the disclaimer is often treated in connection with the latter; but in the latter case it is as distinct in its substance, though incorporated with the answer in one and the same formal pleading, as a plea where incorporated with an answer. In one class of cases, and one only, it is believed a disclaimer may be used alone. This is where the bill simply contains a naked allegation that the defendant has or claims an interest in the subject-matter of the controversy, without specifying any particulars or facts as to the nature of such claim;[5] and in such a case the defendant may at once free himself from all connection with the suit by a formal disclaimer. A mere witness may thus avoid answering. But where

sas Pac. Ry. Co. v. McBratney, 12 Kan. 9; Johnson v. Schumacher, 72 Tex. 334, 12 S. W. 207. See Etter v. Dignowitty, 77 Tex. 212, 13 S. W. 973. But the costs are discretionary, and, where justice and equity demand, the defendant will be charged with costs, although he disclaims. See Finch v. Martin, supra; Kitts v. Willson, 130 Ind. 492, 29 N. E. 401; Thompson v. Hudson, 34 Beav. 107. Where the disclaimer is properly filed, the bill should be dismissed at once as to such defendant. See Meade v. Finley, 47 Ill. 406; Kennedy v. Kennedy, 66 Ill. 190; Isham v. Miller, 44 N. J. Eq. 61, 14 Atl. 20; Gullett v. O'Connor, 54 Tex. 408; Spofford v. Manning, 2 Edw. Ch. (N. Y.) 358.

[3] Story, Eq. Pl. § 844; Mounsey v. Burnham, 1 Hare, 15; Glassington v. Thwaites, 2 Russ. 458.

[4] See note 1, supra; Story, Eq. Pl. § 838; Mounsey v. Burnham, 1 Hare, 15. A disclaimer estops defendant from thereafter asserting the interest disclaimed. See Tappan v. Water-Power Co., 157 Mass. 24, 31 N. E. 703; Wood v. Taylor, 3 Eq. Rep. 513, 3 Wkly. Rep. 321; In re Burrell, L. R. 7 Eq. 399, 17 Wkly. Rep. 516. Where a person, not made a party to a bill, on the hearing enters his appearance and disclaims all interest in the subject-matter, he will be bound by it, and this will cure the error, if any, in not making him a formal party in the bill. Marsh v. Green, 79 Ill. 385.

[5] See Graham v. Coape, 9 Sim. 93, 102. Where the only ground for making one a party defendant to a cross bill who was not a party to the original bill was that he claimed an interest in the property to be affected by the decree sought, and he in his answer disclaims all claim of title or interest, the bill should be dismissed as to him. Kennedy v. Kennedy, 66 Ill. 190. See, also, Meade v. Finley, 47 Ill. 406.

the bill, in addition to the allegation of an interest in the defendant, states other facts, as that the defendant has mixed himself up with the whole transaction, thus necessitating the filing of the bill, a mere disclaimer will not entitle him to be dismissed without an answer;[6] nor where the defendant, though an agent, is charged by the bill with personal fraud, can he avoid answering fully.[7] It is a general rule, applicable to disclaimers, that a defendant cannot thereby free himself from an actual liability;[8] as, while he

[6] Graham v. Coape, 9 Sim. 93, 102; Whiting v. Rush, 2 Younge & C. 546; Dobree v. Nicholson, 22 Law T. (N. S.) 774. A proper or necessary party to a bill in equity cannot by a disclaimer avoid his liability under the bill. Bromberg v. Heyer, 69 Ala. 22. A defendant cannot deprive the complainant of his right to an answer by filing a disclaimer. A defendant cannot file a disclaimer, except when it is proper, on his disclaiming any interest in the subject of the litigation, to dismiss the bill against him. If a defendant disclaims when he ought to answer, the court may order his disclaimer taken from the files. Isham v. Miller, 44 N. J. Eq. 61, 14 Atl. 20; Ellsworth v. Curtis, 10 Paige (N. Y.) 105, 107.

[7] Bulkeley v. Dunbar, 1 Anstr. 37.

[8] Story, Eq. Pl. § 840, and cases cited. See Kane Co. v. Herrington, 50 Ill. 232; Worthington v. Lee, 2 Bland (Md.) 678. In Isham v. Miller, 44 N. J. Eq. 61, 14 Atl. 20, the court said: "The principal object of the suit in this case is to procure a decree declaring a deed absolute on its face to be a mortgage. The deed was made by the complainant to the defendant. The bill alleges that the debt which the deed was intended to secure has been paid, and also that the defendant, on its payment, conveyed part of the land, which she held as security, to the complainant, and the residue to another person, but that at the time these conveyances were made the defendant was a married woman, having a husband living, who did not join with her in the execution of the deeds, and so, in consequence of the invalidity of her effort to convey, she still stands seised of the legal title to the lands. To unravel this tangle, the complainant seeks a decree declaring that the deed is a mortgage, and that the mortgage debt has been paid, and thus procure an establishment of his own title by a judicial declaration that the defendant's right in the lands has been discharged. To meet the case thus made by the complainant the defendant says that she did not have, at the time the complainant filed his bill, any right, title, or interest, either legal or equitable, in the lands in question, nor did she claim to have, and also that, if the complainant had applied to her before filing his bill, she would have executed any conveyance or release necessary to perfect his title. The complainant moved to strike the defendant's disclaimer from the files. The ground of his motion is that the actionable facts alleged in the bill make a case against which a disclaimer constitutes no defense; or, to state the ground in another form, the complainant says, for

may have no personal interest whatever in the subject of the complainant's claim, others may have an interest in it against him, by reason of the fact that he is accountable to them; and in all

a defendant, standing in the position which the defendant in this case does, to say, 'I disclaim all right and interest in the subject-matter of the litigation,' neither shows that the complainant is not entitled, as against the defendant, to the relief he asks, nor that the defendant is entitled to a dismissal. A disclaimer is a mode of defense, and, if it prevails, the defendant must be dismissed, and, as a general rule, he will have a right to be dismissed, with costs to be paid by the complainant. If, however, a defendant attempts to disclaim in a case where his disclaimer does not entitle him to a dismissal, but he must, notwithstanding his disclaimer, still be retained as a party defendant, in order that the relief which the facts alleged in the bill show the complainant to be entitled to may be decreed to him, the pleading, being useless to the defendant, and without effect in the cause, except as an obstruction, will be ordered to be taken from the files. Judge Story states the rule on this subject as follows: 'A defendant cannot, by a disclaimer, deprive the plaintiff of the right of requiring a full answer from him, unless it is evident that the defendant ought not, after such disclaimer, to be retained as a party to the suit; for a plaintiff may have a right to an answer, notwithstanding a disclaimer, and in such a case the defendant cannot shelter himself from answering by alleging that he has no interest.' Story, Eq. Pl. § 840. This statement of the rule simply repeats what was declared by Lord Eldon in Glassington v. Thwaites, 2 Russ. 458, and by Chancellor Walworth in Ellsworth v. Curtis, 10 Paige (N. Y.) 105. And Lord Cottenham, in Graham v. Coape, 3 Mylne & C. 638, held, that the course to be pursued, where a defendant disclaimed when he ought to answer, was to order the disclaimer to be taken from the files. Now, it is entirely certain that the defendant is not entitled to a dismissal; for, giving her disclaimer its utmost effect, it is still, on the admitted facts of the case, so plain as to be beyond dispute that, notwithstanding her conveyances, she still holds the legal title to the lands in question, and will, while she and her husband both live, continue to do so until one of two things happens, namely, until she and her husband join in making a conveyance of the lands, or it is judicially declared that she simply held the legal title to them in pledge as security for the payment of a debt, and that the debt has been paid. For the defendant to say that she disclaims all right and title to the lands amounts to absolutely nothing at all, either as a ground of dismissal or as a means of transmitting or relinquishing her right. The thing that the complainant wants is a judicial declaration that the deed which he made to the defendant is not what on its face it purports to be, but a mortgage. If the facts stated in his bill are true, the complainant is unquestionably entitled to such a declaration. In view of the facts alleged in the bill, such a declaration can be made against nobody but the defendant. Without her before the court as a party defendant, the suit, for all practical purposes, will be abated, and no decree can be

such cases, if he disclaims, he must also answer fully.[9] If a disclaimer alone is to be relied on, it must show that he is under no liability in respect to the matters charged in the bill; and it may often happen, where a defendant who has had an interest, but has parted with it, files a disclaimer, that the complainant will be entitled to an answer, not only to ascertain whether the interest has been transferred or not, but also to discover the person who should be made a party.[10]

As with the other modes of defense, a disclaimer may be used in conjunction with a demurrer, plea, or answer, provided each method clearly refers to a separate and distinct part of the bill; this requirement being necessary because the disclaimer, being inconsistent with any other mode of defense, would be overruled by demurring, pleading, or answering to the same matter.[11]

made; for she is the only person against whom relief, of the kind sought, can be given. This statement of the issue tendered by the bill shows, as I think conclusively, that any pleading on the part of the defendant which does not, in substance, either deny or admit that the deed is a mortgage, does not in any manner meet the complainant's case. A disclaimer, in view of the case made by the complainant's bill, is obviously without either object or effect. The complainant's motion must prevail."

[9] See Glassington v. Thwaites, 2 Russ. 458; Graham v. Coape, 9 Sim. 102; Ellsworth v. Curtis, 10 Paige (N. Y.) 105.

[10] See Ellsworth v. Curtis, 10 Paige (N. Y.) 105; Carrington v. Lents, 40 Fed. 18, 20.

[11] Story, Eq. Pl. § 839.

CHAPTER VI.

DEMURRER.

246-250. Definition and Nature.
251-253. Form of Demurrer—General and Special Demurrers.
254. Demurrers Ore Tenus.
255. Speaking Demurrers.
256. Admissions Made by Demurrer.
257-261. Effect of Order Sustaining or Overruling Demurrer.
262. Conclusiveness of Final Order or Decree Entered on Demurrer.
263. Grounds of Demurrer.
264. Demurrers to Original Bills for Relief.
265. Demurrers to Both Relief and Discovery.
266-267. Demurrers to Relief Alone.
268. Objections to the Jurisdiction.
269. Objections to the Person of Complainant.
270. Objections to the Form or Frame of the Bill.
271. Objections to the Substance of the Bill.
272. Demurrers to Discovery Alone.
273-274. Objections to Particular Discovery.
275. Demurrers to Original Bills not for Relief.
276. Demurrers to Bills not Original.

DEFINITION AND NATURE.

246. A demurrer in equity is a mode of defense by which the defendant, admitting, for the sake of argument, the truth of the facts well pleaded alleged in the bill, questions their legal sufficiency for the complainant to proceed upon or to oblige the defendant to answer.

247. It is a mode of defense available whenever, and only when, the bill is defective upon its face, either in form or substance.

248. The principal object of a demurrer is to avoid giving a discovery, and the delay and expense of a trial upon the facts, by defeating the plaintiff upon some legal ground at the outset.

249. A demurrer may be interposed either to the whole of the bill or a distinct part thereof, and may be used in conjunction with an answer or plea, or both, or even incorporated with an answer or plea in one and the same pleading, provided each method of defense is directed to a distinct part of the bill, and is so used that the sufficiency of the demurrer may be determined without reference to the associated defenses.

250. The bill, including cross bills, is the only pleading which can be demurred to, a demurrer being inapplicable to a plea or answer.

A demurrer in equity has been defined as an allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that, as they are therein set forth, they are insufficient for the complainant to proceed upon, or to oblige the defendant to answer; or that for some reason apparent on the face of the bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer to the whole bill, or to some certain part thereof.[1]

The demurrer in equity pleading is taken from the common-law system, and its use depends upon the same principle, viz. that the defects to be taken advantage of must appear upon the face of the pleading opposed. In its nature and office, it is thus analogous to the same method of defense at common law, though, in equity, it is available as a defense only to the original or amended bill of the complainant, or by a defendant in a cross bill, and cannot be used in opposition to a disclaimer, plea, or answer; and it is used, not so much to obtain a determination of the suit on its merits, as at common law, but rather to obtain the decision of the court whether the defendant shall be compelled to answer the charge as made, or to make the discovery asked for, praying a dismissal of the bill, instead of a judgment barring the complainant.[2]

§§ 246–250. [1] Bouv. Law Dict.; Mitf. Eq. Pl. 107.

[2] Where a bill is demurrable, an amended bill founded upon facts which

Again, as at common law, the demurrer in equity is rather an excuse for not pleading than a "pleading," properly so called, since it imports, in effect, that the defendant will go no further until the court has decided that the complainant has shown sufficient matter, in point of law, to maintain his suit. It is thus, strictly, a method of defense, by which the defendant in equity may, at an early stage of the cause, upon the complainant's own showing, and admitting the facts stated to be true, test the legal sufficiency of the charge or statement upon which the complainant's right to relief or discovery, or both, is based and asserted.[3]

As above stated, a demurrer can be taken only to the complainant's bill, original or amended, or to a cross bill;[4] and it may be either for formal defects, such as the nonjoinder or misjoinder of parties, or for multifariousness or want of proper certainty, or for defects in the substance of the allegations of fact which make up the body of the complainant's charge; in other words, for defects, either in the matter stated or the manner of stating it,[5]

have occurred since the filing of the original bill is also demurrable. Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585.

[3] Story, Eq. Pl. §§ 446, 447. See Henry v. Blackburn, 32 Ark. 445, as instancing a case where a demurrer would not lie.

[4] A demurrer to an answer is unknown in equity. Com. v. Pittston Ferry Bridge Co. (Pa. Com. Pl.) 8 Kulp, 29; Stone v. Moore, 26 Ill. 165; Brown v. Mortgage Co., 110 Ill. 235; Barry v. Abbot, 100 Mass. 396, 398; Banks v. Manchester, 128 U. S. 244, 250, 9 Sup. Ct. 36; Crouch v. Kerr, 38 Fed. 549; Travers v. Ross, 14 N. J. Eq. 258; Edwards v. Drake, 15 Fla. 666. See Williams v. Owen, 1 Ch. Cas. 56; Wakelin v. Walthal, 2 Ch. Cas. 8. The remedy for a defective answer is by exceptions. Brown v. Mortgage Co., 110 Ill. 235; Stone v. Moore, 26 Ill. 165; Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. 18. A question as to the sufficiency of a plea is properly raised, not by demurrer, but by setting the plea down for argument. Dixon v. Dixon, 61 Ill. 324; Lester v. Stevens, 29 Ill. 155; Beck v. Beck, 36 Miss. 72; Winters v. Claitor, 54 Miss. 341; Travers v. Ross, 14 N. J. Eq. 254; Thomas' Trustees v. Brashear, 4 T. B. Mon. (Ky.) 65; Rouskulp v. Kershner, 49 Md. 516. The same is true of a replication. Beck v. Beck, 36 Miss. 72. It is not the proper practice to dispose of a plea in equity on demurrer, but the demurrer may be treated as a setting of the plea for hearing. Spangler v. Spangler, 19 Ill. App. 28. Cf. Cochran v. McDowell, 15 Ill. 10; Dixon v. Dixon, 61 Ill. 324. Where a cross bill sets up facts which show nothing more than a defense, and which, if proved, would afford no affirmative relief, it is demurrable. Wing v. Goodman, 75 Ill. 159.

[5] Story, Eq. Pl. §§ 453, 454.

which are apparent upon the face of the statement. The rule has therefore been adopted that, in considering a demurrer to a bill in equity, the court will look only at the bill and exhibits.[6] The grounds of demurrer will hereafter be considered in detail, but it is true, as a general proposition, that a violation of any of the rules of equity pleading elsewhere stated is ground for demurrer, where the fault is disclosed upon the face of the bill. By a demurrer in equity, the defendant raises a question of law only,[7] as to the sufficiency of the allegations of fact contained in the bill, admitting the same to be true, to require the defendant to answer the charge against him, either because the case as stated by the bill does not contain some essential ingredient necessary to establish the complainant's right as asserted, or because some fact is therein stated which operates as an avoidance of such right.[8] Technically, the demurrer tenders an issue of law, for determination by the court, but this expression does not have the same significance here as in the common-law procedure, the object in equity being, not the formation of a single definite issue for trial, but a presentation of the facts, whether containing one or more issues.

A demurrer may generally be taken to the bill, as a matter of practice, at any time within the period allowed for presenting the formal defense, which time is generally fixed by rules of court.[9] It may extend to the whole bill, or to any distinct part, and may be used concurrently with a disclaimer, plea, or answer, provided each method refers to and opposes a distinct part of the bill.[10]

[6] See, as an application of the rule, Waters v. Perkins, 65 Ga. 32. The demurrer to a bill cannot be defeated by interpolating the bill with certain suggested amendments at the time of the hearing. Mutual Reserve Fund Life Ass'n v. Bradbury, 53 N. J. Eq. 643, 33 Atl. 960.

[7] Story, Eq. Pl. § 452; Ford v. Peering, 1 Ves. Jr. 72, 77. See, also, East India Co. v. Henchman, Id. 287, 290; Baker v. Booker, 6 Price, 381.

[8] But a bill is not demurrable if it contains equitable merits, although it be admitted that some of the other circumstances stated cannot be of avail. Reading v. Stover, 32 N. J. Eq. 326.

[9] It was held, in Florida, that a demurrer could not be filed one year after an answer had been filed, and after replication and order of reference to take testimony. Sanderson's Adm'rs v. Sanderson, 17 Fla. 820, 834.

[10] Story, Eq. Pl. § 494. See Crouch v. Hickin, 1 Keen, 385, 389; Ellice v.

The general rule of chancery as to the latter method has been that, if an accompanying answer or other pleading covers the same ground as the demurrer, the demurrer will be overruled;[11] but this result does not follow in the federal courts, since the adoption of equity rule 37, which provides that no demurrer or plea shall be held bad on argument only because the defendant's answer may extend to some part of the same matter as may be covered by such demurrer or plea;[12] and, since the changes which permit most defenses to be presented by answer, there is now less occasion for the use of this method of pleading. Separate demurrers may be taken by the defendant to different parts of the bill,[13] and, as a matter

Goodson, 3 Mylne & C. 653; Devonsher v. Newenham, 2 Schoales & L. 199. A party cannot plead to the merits of a cause, and at the same time demur to the sufficiency of the petition. Hoadley v. Smith, 36 Conn. 371. Where a demurrer is intended to reach only a part of the bill, it should definitely state the part demurred to. Fall v. Hafter, 40 Miss. 606.

[11] If defendants demur to the whole bill, and then answer it, their answer will overrule their demurrer. Droste v. Hall (N. J. Ch.) 29 Atl. 437. And the rule is the same where the demurrer is contained in the answer, and is to a part of the bill, if the answer extend to that part of the bill to which the demurrer is applied; the rule being that, if the answer go further than to deny the combination usually charged, it overrules the demurrer. Bond v. Jones, 8 Smedes & M. (Miss.) 368. And so if the demurrer be to the whole bill, and the answer be to a part, it overrules the demurrer. Gray v. Regan, 23 Miss. 304; Fall v. Hafter, 40 Miss. 606. And this rule applies where there is a demurrer to the bill and an answer filed denying the fraud, in a case where the fraud is the gravamen of the bill; but, where the answer and the demurrer apply to separate and distinct parts of the bill, the answer will not overrule the demurrer. Fall v. Hafter, 40 Miss. 606. An answer overrules a demurrer when the defendant does not restrict his answering to the parts not covered by it. Thus, it is done where the defendant commences paragraphs with, "And this defendant, further answering the said bill of complaint, says," etc. Bruen v. Bruen, 4 Edw. Ch. (N. Y.) 640. If an answer be filed before a demurrer is disposed of, it overrules the demurrer. Baines v. M'Gee, 1 Smedes & M. (Miss.) 208. The right to demur is waived by an answer. Brill v. Stiles, 35 Ill. 305. Where the defendant answers upon the overruling of a demurrer to a bill, he waives his demurrer. Gordon v. Reynolds, 114 Ill. 118, 28 N. E. 455.

[12] See, under this rule, Hayes v. Dayton, 8 Fed. 702; Adams v. Howard, 9 Fed. 347.

[13] See Payne v. Berry, 3 Tenn. Ch. 154. Where there is a demurrer to the

of form, a demurrer may be, and often is, where there is an accompanying answer to that part of the bill not already opposed, incorporated with such answer, in one and the same pleading; but, if this mode is adopted in the presentment of a demurrer and answer, the pleading must be so framed that the demurrer will appear as separate and distinct from the matter composing the answer, so that its sufficiency can be determined by the court independent of the latter.[14] Where a demurrer is taken to the whole bill, and the action can be sustained upon any ground, the demurrer will be overruled.[15]

FORM OF DEMURRER—GENERAL AND SPECIAL DEMURRERS.

251. A demurrer, according to its form, may be either:
(a) General, or
(b) Special.

252. A general demurrer is one which assigns no special ground of objection, save that the bill is without equity. It is generally sufficient as to all defects in substance.

253. A special demurrer is one which specifies the particular defects objected to. It is indispensable where the objection is to the defects of the bill in point of form only; that is, where the complainant, notwithstanding the objection, appears entitled to a decree upon the merits of the cause.

whole bill, and also to a part, and the latter is sustained, the proper decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged to be bad, overrule the demurrer to the residue, and direct the defendant to answer thereto. Powder Co. v. Powder Co., 98 U. S. 126.

[14] Holt v. Daniels, 61 Vt. 89, 17 Atl. 786.

[15] See, as an application of this rule, Trafford v. Wilkinson, 3 Tenn. Ch. 449. See, also, Perry v. Littlefield, 17 Blatchf. 272, Fed. Cas. No. 11,008; Gooch v. Green, 102 Ill. 507.

The following will illustrate the form of a general demurrer for want of equity:

TITLE OF CAUSE.

Circuit Court of the United States, District of Minnesota, Third Division.

John Jones,
Complainant,
vs.
James Smith,
Defendant.
} In Equity.

TITLE OF DEMURRER.

The Demurrer of James Smith, Defendant, to the Bill of Complaint of John Jones, the Above-Named Complainant.

INTRODUCTION.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint contained to be true, in manner and form as therein set forth and alleged, doth demur thereto, and, for cause of demurrer, showeth:

BODY.

That the said complainant, in and by his said bill, has not made or stated such a case as entitles him, in a court of equity, to any discovery from this defendant, or to any relief against him, as to the matters contained and set forth in said bill, or any of said matters.

CONCLUSION.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and humbly prays the judgment of this honorable court, whether he shall be compelled to make any answer to the said bill, and prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained. A. B., Defendant's Solicitor.

Title of Cause.

The demurrer, like any pleading in the cause, must begin with the title of the cause, showing the court and the parties correctly, and in accordance with the bill.

Title of Demurrer.

It is also usually entitled as in the form given above; but, if accompanied by a plea or answer, the title will then be the "Demurrer and Plea," or the "Demurrer and Answer," etc.[1] If taken to an

§§ 251–253. [1] A motion to dismiss, if no objection is interposed, may be treated as a demurrer for want of equity. President, etc., of Town of Tama-

amended or supplemental bill, or to any other of the bills not original, it should also so indicate.

Introduction.

The commencement is also a necessary formal part of the demurrer, and contains, in the usual form, a protestation against confessing the facts, as stated in the bill, to be true.[2] In deference to a general rule in all pleading that well-known and recognized precedents should be followed, the form is still retained, though the reason for its use, that of avoiding a conclusion of the defendant in another suit by the admission, has ceased to be of any force.[3] The commencement should also contain a statement of the extent of the demurrer, showing whether it is to the whole bill, or to a part, and, if the latter, to what part,[4] though it seems that this may also necessarily appear, when several objections are taken, in the body of the demurrer.[5] The part or parts of the bill referred to must be positively and clearly designated, and a special demurrer must point out by page, paragraph, folio, or in some equally specific manner, the portions objected to, and state the cause of demurrer to each part.[6]

roa v. Trustees of Southern Illinois Normal University, 54 Ill. 334. Cf. Brill v. Stiles, 35 Ill. 305; Vieley v. Thompson, 44 Ill. 9; Hickey v. Stone, 60 Ill. 458; Swinney v. Beard, 71 Ill. 27. Where a demurrer put in with an answer is not restricted in its heading it is bad. Therefore, where the caption was, "The demurrer and answer," etc., the demurrer was held bad because the caption did not specify that the demurrer was to a part and the answer to the residue of the bill. The language used imported it to be a demurrer as well as an answer to the whole bill. Bruen v. Bruen, 4 Edw. Ch. (N. Y.) 640.

[2] Story, Eq. Pl. § 452.

[3] "The protestation usually inserted in a demurrer is a practice derived from the common law, and has no effect in limiting admissions as to facts properly alleged in the pending suit." Taylor v. Holmes, 14 Fed. 498, 501. In New Hampshire this clause must be omitted. Ch. Rule 6, 38 N. H. 606.

[4] Coop. Eq. Pl. 12, 113; Bruen v. Bruen, 4 Edw. Ch. (N. Y.) 640; Van Hook v. Whitlock, 3 Paige (N. Y.) 409, 418; Jarvis v. Palmer, 11 Paige (N. Y.) 650; Baylee v. Brown, 10 Ir. Eq. 180; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. 18; Devonsher v. Newenham, 2 Schoales & L. 199.

[5] See 1 Daniell, Ch. Pl. & Prac. (6th Am. Ed.) 985, as to the form of a demurrer.

[6] Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640.

Body of the Demurrer.

The body of the demurrer is its most important part, and contains the statement of the cause of demurrer assigned by the defendant, upon which alone he can maintain his objection to the bill. In the above form, for want of equity, the statement is a general one, and it is so in case of objection for multifariousness; but it is the safer practice to set out the cause or causes of demurrer specifically, as otherwise the complainant may require it to be done.[7] As already stated, the demurrer must show whether it is to the whole bill or to a part or parts, and clearly designate what part or parts; and it is equally necessary that the causes of demurrer be so stated as to clearly indicate the parts of the bill at which they are directed. Both these things may necessarily appear in the body or statement. In assigning causes of demurrer, the defendant is not limited to one, but may insert as many as he chooses, either to the whole bill, or to the part demurred to, and, if any one is held good, the demurrer will be sustained.[8] A demurrer to the whole bill, and assigning two or more causes, will be treated as a single demurrer, and sustained upon either cause.[9]

Conclusion—Prayer for Judgment.

If the demurrer is not accompanied by a plea or answer, or both, the prayer for judgment follows the statement of cause of demurrer, usually in the above form. If the demurrer is to a part only, the

[7] "The formal statement of causes of demurrer, though usual, is not absolutely necessary. The assertion of a general demurrer is that the plaintiff has not, on his own showing, made out a case. If the causes of demurrer are not formally set forth, the plaintiff may object, and require them to be thus stated. If the defendant assigns causes of demurrer ore tenus, he will not generally be entitled to costs; for, if the objections had been formally stated, the plaintiff might have submitted to the demurrer and asked leave to amend his bill." Taylor v. Holmes, 14 Fed. 498, 501.

[8] Story, Eq. Pl. § 443. See Jones v. Frost, Jac. 466, 3 Madd. 1, 9; American Freehold Land-Mortgage Co. of London v. Walker, 31 Fed. 103; Harrison v. Hogg, 2 Ves. Jr. 323; Barber v. Barber, 5 Jur. (N. S.) 1197; Brien v. Buttorff, 2 Tenn. Ch. 523; Wellesley v. Wellesley, 4 Mylne & C. 554.

[9] 1 Daniell, Ch. Prac. (5th Ed.) 589. Although a bill is defective in omitting allegations which ought to have been made, yet a demurrer thereto which fails to set out any specific defect should not avail the defendant if the result of the suit is a full and final adjustment of his rights. Freeman v. Reagan, 26 Ark. 373.

prayer asks that the defendant may be excused from answering that part; and when there is a demurrer to part, and a plea or answer, or both, to the residue, such pleadings usually follow immediately after the statement of causes of demurrer, and conclude with a submission as to whether complainant is entitled to any further answer. The demurrer must also be signed by the defendant's solicitor,[10] and, as a matter of practice, in the federal courts at least, must invariably be accompanied by a certificate of counsel that, in his opinion, it is well founded in point of law,[11] and by the affidavit of the defendant that it is not interposed for delay.[12] Failure to comply with these requirements may result in having the demurrer "ordered off the file," as it is termed, or, possibly, it may be overruled.[13]

General or Special Demurrers.

A general demurrer is one which ordinarily assigns, as cause of demurrer, only the general formulary that the bill is without equity,[14] as in the form already given; and this form of demurrer

[10] Graham v. Elmore, Har. (Mich.) 265. In the absence of statute, demurrers need not be under oath. Carroll v. Waring, 3 Gill & J. (Md.) 491, 497.

[11] Eq. Rule 31.

[12] Eq. Rule 31. Demurrers which are unsupported either by certificate of counsel or affidavit of the party, as required by Eq. Rule 31, must be disregarded, but they may be considered as grounds of objection to granting a preliminary injunction prayed for. Preston v. Finley, 72 Fed. 850. See Nelson v. Ferdinand, 111 Mass. 300. A statement in the nature of a demurrer, for want of equity, contained in the answer to a bill in equity, need not be accompanied by a certificate that it is not intended for delay, under Gen. St. Mass. c. 113, § 5. Mill River Loan Fund Ass'n v. Claflin (1864) 9 Allen (Mass.) 101.

[13] See Taylor v. Brown, 32 Fla. 334, 340, 13 South. 957; Keen v. Jordan, 13 Fla. 327; Secor v. Singleton, 9 Fed. 809; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936.

[14] Story, Eq. Pl. § 455. A demurrer to a bill for want of equity cannot be sustained, unless no discovery or proof properly called for by, or founded upon, the allegations of the bill would make the subject-matter of the suit a proper case for equitable interference. See, also, Hosmer v. Jewett, 6 Ben. 208, Fed. Cas. No. 6,713; Nicholas v. Murray, 5 Sawy. 320, Fed. Cas. No. 10,223. A general demurrer will be overruled where, upon the statements of the bill, it cannot be satisfactorily determined whether the right to belief has been lost by acquiescence. Hoxsey v. Railway Co., 33 N. J. Eq. 119. Defects of form in a bill in equity cannot be taken advantage of by general de-

may still be used when that is the ground relied on, or, perhaps, in some cases of defects in form, as want of certainty, the absence of the necessary affidavit, or of an offer by the complainant to do equity if the latter is required, or an addition of a complainant shown to be without any interest in the controversy.[15] A general demurrer for want of equity will not be sufficient, however, where the objection is only to a discovery,[16] and one for want of parties must point out those who should be joined with sufficient accuracy to enable the complainant to amend by adding them.[17]

While it is not always essential that the cause of demurrer should be fully stated, it seems the better practice, in all cases, to follow this method, and thus avoid the danger of being left without a foundation for objections to be urged on the argument; though, on the other hand, it is not advisable to apprise the complainant or his counsel of more than is necessary.[18] A special demurrer, as at

murrer. Glidden v. Norvell, 44 Mich. 202, 6 N. W. 195; Day v. Cole, 56 Mich. 295, 22 N. W. 811. General demurrer for want of equity raises only the question whether there is any equity whatever in the bill. Cochrane v. Adams, 50 Mich. 16, 14 N. W. 681. Where an injunction bill avers special injury, without explaining what, and the answer traverses the averment, the common formula questioning the bill for want of equity is not enough to raise, on the hearing, the point that there should have been greater particularity, especially where it is plain that the want of certainty has caused no prejudice. Pratt v. Lewis, 39 Mich. 7.

[15] See 1 Daniell, Ch. Pl. & Prac. 586, 587.

[16] Whittingham v. Burgoyne, 3 Anstr. 900. See, also, Marsh v. Marsh, 16 N. J. Eq. 397.

[17] Attorney General v. Jackson, 11 Ves. 365, 369; Chambers v. Wright, 52 Ala. 444; post, p. 395. Upon a general demurrer, which points out no defects of form, the objection that the names of the defendants are omitted from the prayer for answer in the bill cannot be raised. Boon v. Pierpont, 28 N. J. Eq. 7.

[18] In Tennessee no objections to a pleading will be regarded unless stated in the demurrer. Fitzgerald v. Cummings, 1 Lea (Tenn.) 232. Under paragraph 225 of the rules of the court of chancery, which requires that "every demurrer, whether general or special, shall state the particular grounds of the demurrer," a simple statement of a want of equity in a general demurrer is a sufficient specification of ground of the demurrer if, on inspection of the bill, complainant's equity is not obvious at first sight; but the demurrant must point out the specific ground on which his demurrer is founded, where he relies on a defect that cannot be readily discerned by the court on an inspection of the bill. "Under the old prac-

common law, must clearly point out and specify the grounds upon which it is presented, and must also, as we have seen, refer to and point out the distinct part of the bill to which it is directed.[19]

tice, it sometimes happened that, although a general demurrer was well founded in point of law, yet the ground upon which it rested was so far beyond the line of vision of the ordinary practitioner that he could not see it without having it pointed out to him, and only lawyers of very extended experience, or unusual acumen, would readily discern it. A simple allegation of want of equity gave the ordinary practitioner, in such a case, no information whatever of the ground on which his statement of his client's case would be attacked. The demurrer rather emboldened than disturbed him; for, not seeing the ground of the demurrer, he supposed none existed, and he would proceed to the argument of the demurrer in ignorance of the ground on which it rested, and generally without preparation; and the consequence was that in such cases the court was either compelled to defer the case for further argument, or to decide it upon an imperfect argument. The purpose of the rule was to cure this mischief, by making it the duty of a demurrant, when he filed his demurrer, to make such a disclosure of the ground of his demurrer as would render it probable, when his demurrer came on for argument, that all the questions raised by it would be fully, fairly, and thoroughly discussed." Essex Paper Co. v. Greacen, 45 N. J. Eq. 504, 19 Atl. 466, 467. "Demurrers are sometimes distinguished as either 'general' or 'special,' but these terms have a different meaning in equity from what they have at common law. First, every demurrer in equity is required to point out the defects in the bill on which it is grounded, and a general demurrer differs from a special one only in requiring the cause of demurrer to be stated less specifically. The only species of demurrer to which the term 'general' is commonly applied is a demurrer for want of equity; for this differs from most other demurrers in requiring no other cause to be stated than that the plaintiff has not made such a case by his bill as entitles him to any relief. Secondly, a defect in a bill which a demurrer does not point out is not therefore waived, as in case of a defect which has to be specially demurred to at common law; for a defendant may generally avail himself of any objection which goes to the merits of the bill upon the hearing of the cause upon pleadings and proofs, without having demurred at all, or even pointed out the defect in his answer. The only necessary consequence, therefore, of not specifying in a demurrer any particular defect in the bill, is that the defendant loses the opportunity to take advantage of such defect by demurrer,

[19] See Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640, where a demurrer, to a long and complicated bill, adopting the general formulary "that, as to so much of the bill as seeks," etc., was held indefinite and obscure, the court citing Robinson v. Thompson, 2 Ves. & B. 118; Weatherhead v. Blackburn, Id. 121; Devonsher v. Newenham, 2 Schoales & L. 199. See, also, Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. 18.

Demurrer Bad in Part.

With regard to general demurrers, it is a rule of universal application that where a general demurrer is filed to the whole bill, and there is any part to which the defendant should answer, the demurrer will be overruled.[20] The principle of this rule is that a general demurrer, like a plea at common law,[21] is treated as an entirety, and, if bad in part, is bad in toto,[22] since it is founded

and even that consequence does not follow absolutely. Thirdly, if a demurrer states no cause at all upon its face, it will be overruled, and the defendant will be in the same position as if he had not demurred at all; but, if it states one or more causes, it may be sustained in argument upon other grounds not stated in the demurrer itself. This, however, which is called 'demurring ore tenus,' is attended with a penalty; for, when a demurrer is allowed only for causes not stated on its face, the defendant does not generally recover costs, but, on the contrary, has to pay costs to the plaintiff." Langd. Eq. Pl. § 95.

[20] Story, Eq. Pl. § 443. See Metcalf v. Hervey, 1 Ves. Sr. 248; Jones v. Frost, 3 Madd. 1, 8; Kuypers v. Reformed Church, 6 Paige (N. Y.) 570; Tillman v. Thomas, 87 Ala. 321, 6 South. 151; Dimmock v. Bixby, 20 Pick. (Mass.) 374; Shipman v. Furniss, 69 Ala. 555, 562; Snow v. Counselman, 136 Ill. 191, 197, 26 N. E. 590; Hoxsey v. Railway Co., 33 N. J. Eq. 119; Post v. Railroad Co., 144 Mass. 341, 350, 11 N. E. 540; Shaw v. Chase, 77 Mich. 436, 43 N. W. 883; Stewart v. Masterson, 131 U. S. 151, 9 Sup. Ct. 682; Merriam v. Publishing Co., 43 Fed. 450. A party cannot plead to the merits of a cause, and at the same time demur to the sufficiency of the petition. Hoadley v. Smith, 36 Conn. 371.

[21] Shipman, Com. Law Pl. (2d Ed.) § 351.

[22] See Vail's Ex'rs v. Central R. Co., 23 N. J. Eq. 466, and the cases cited to note 20, supra. The rule will not be departed from where it appears that the litigation would not thus be narrowed, and that an inequitable advantage might be gained by one party over another. Phœnix Ins. Co. v. Day, 4 Lea (Tenn.) 247. A general demurrer must be overruled if there is matter in the bill upon which any equitable relief can be granted. Clark v. Davis, Har. (Mich.) 227; Williams v. Hubbard, Walk. (Mich.) 28; Hawkins v. Clermont, 15 Mich. 511; Hoffman v. Ross, 25 Mich. 175; Wilson v. Eggleston, 27 Mich. 257; Glidden v. Norvell, 44 Mich. 202, 6 N. W. 195; Wilmarth v. Woodcock, 58 Mich. 482, 25 N. W. 475; Darrah v. Boyce, 62 Mich. 480, 29 N. W. 102; Carney v. Carney, 63 Mich. 382, 29 N. W. 875; Hatch v. Village of St. Joseph, 68 Mich. 220, 36 N. W. 36; Gooch v. Green, 102 Ill. 507; George v. Railroad Co., 101 Ala. 607, 14 South. 752; Beall v. Lehman-Durr Co. (Ala.) 18 South. 230. If a defendant who should have demurred to discovery only, demurs to both discovery and relief, the demurrer will be overruled. Edwards v. Hulbert, Walk. (Mich.) 54; Burpee v. Smith, Id. 327. Where a demurrer is to the whole discovery and relief prayed by the bill, if the complainant is entitled to

upon an absolute, certain, and clear proposition that the bill as a whole, admitting its charges to be true, is insufficient in point of law, and would be dismissed at a hearing upon its merits.[23] Thus, in case of a bill showing that a remedy in chancery and one at law were equally available for the object sought to be attained, it was held that the fact that the joinder of one sufficient ground for relief with another which was insufficient did not impair the effect of the former, and a demurrer to the whole bill was overruled.[24] The rule also applies to special demurrers, if grounds assigned do not touch the particular objectionable matter;[25] but it seems that, in case of several defendants, a demurrer may be good as to one and bad as to others, provided always that it is a joint and several demurrer.[26] A joint demurrer, like a joint plea, must be good or bad as to all parties who present it.[27]

As a result of this rule, a demurrer must not be too general, as by applying it to the whole bill when the objection raised is good to a part only, since the demurrer must stand or fall as a whole.[28]

any part of the relief the demurrer must be overruled. Thayer v. Lane, Har. (Mich.) 247. A demurrer to the whole bill, containing some matters relievable and others not, is bad unless the bill is multifarious. Dimmock v. Bixby (1838) 20 Pick. (Mass.) 368; Robinson v. Guild (1847) 12 Metc. (Mass.) 323; Pope v. Leonard (1874) 115 Mass. 286. A demurrer cannot be good in part and bad in part; and hence if the demurrer be taken to the whole bill, and a part of the bill be good, the demurrer will be overruled. Graves v. Hull, 27 Miss. 419. The rule is the same at law. And, if a particular ground of demurrer be assigned to the whole bill, it will be overruled, unless the bill in that respect be wholly insufficient for the relief sought. Anding v. Davis, 38 Miss. 574. And so if a ground of demurrer be assigned as against all of the complainants, and it be insufficient as to one of them, it will be overruled as to all. Gibson v. Jayne, 37 Miss. 164.

[23] Vail's Ex'rs v. Central R. Co., 23 N. J. Eq. 466. See Brandon Manuf'g Co. v. Prime, 14 Blatchf. 371, Fed. Cas. No. 1,810.

[24] Shipman v. Furniss, 69 Ala. 563.

[25] See El Modelo Cigar Manuf'g Co. v. Gato, 25 Fla. 886, 7 South. 23.

[26] Mayor, etc., of London v. Levy, 8 Ves. 398, 403; Barstow v. Smith, Walk. (Mich.) 394. On a general demurrer to the whole bill for want of parties defendant, if any claim in the bill is against the defendant alone, the demurrer must be overruled. Trenton Pass. Ry. Co. v. Wilson, 53 N. J. Law, 577, 32 Atl. 1. See Hoxsey v. Railway Co., 33 N. J. Eq. 119.

[27] Story, Eq. Pl. (10th Ed.) § 445; Glasscott v. Copper-Miners' Co., 11 Sim. 305.

[28] Metcalf v. Hervey, 1 Ves. Sr. 248; Verplank v. Caines, 1 Johns. Ch. (N.

It was also the rule, formerly, that, if a demurrer did not cover all of the bill that it might properly have extended to, it was bad;[29] but this doctrine was changed, in England, by the thirty-sixth order in chancery of 1841, adopted in this country by the United States supreme court, so that neither a plea nor demurrer is to be held bad and overruled upon argument, only because such plea or demurrer shall not cover so much of the bill as it might by law have extended to.[30]

SAME—DEMURRERS ORE TENUS.

254. Where a bill is demurred to for causes assigned upon the record, which are overruled, other causes may be assigned orally at the argument. This is called "demurring ore tenus." The court has discretion to impose terms.

Demurrers, strictly speaking, are always in writing; but in a case where a demurrer has already been put in to the whole bill for causes assigned on the record, and such causes are overruled, the defendant may be allowed to assign further causes ore tenus (orally) at the argument.[1] Such a method of demurring will not

Y.) 57; Kuypers v. Reformed Church, 6 Paige (N. Y.) 570. A demurrer to the bill is too broad, and must be overruled, if there is any part of the bill upon which the complainant may have relief. Durling v. Hammar, 20 N. J. Eq. 220, 228. Where a demurrer is too extensive, it must be overruled, but matter pertaining alone to the relief to which the complainant is not entitled will be struck out. Lindsley v. Personette, 35 N. J. Eq. 355. See note 22, supra. See the following additional cases on the same point: Russel v. Lanier, 4 Hawy. (Tenn.) 290; Phœnix Ins. Co. v. Day, 4 Lea (Tenn.) 247; Hunter v. Justices of Campbell Co., 7 Cold. (Tenn.) 49, 58; U. S. v. Southern Pac. R. Co. 40 Fed. 611; Northern Pac. R. Co. v. Roberts, 42 Fed. 734; Stephens v. Overstolz, 43 Fed. 465; Stewart v. Masterson, 131 U. S. 151, 9 Sup. Ct. 682; Reading v. Stover, 32 N. J. Eq. 327; Black v. Black, 27 N. J. Eq. 664, 666; Outwater v. Berry, 6 N. J. Eq. 63.

[29] Dawson v. Sadler, 1 Sim. & S. 537.

[30] Eq. Rule 36.

§ 254. [1] Coop. Eq. Pl. 112; Story, Eq. Pl. (10th Ed.) § 464; Burk v. Foundry Co., 98 Mich. 614, 57 N. W. 804; Barrett v. Doughty, 25 N. J. Eq. 379; Stillwell v. M'Neely, 2 N. J. Eq. 305; Garlick v. Strong, 3 Paige (N. Y.) 440; Hastings v. Belden, 55 Vt. 273.

be permitted, however, unless there is already a formal demurrer to the whole bill on file,[2] and, when allowed, it must be for some cause which covers the whole extent of the demurrer thus of record.[3] An oral demurrer cannot, it has been held, be allowed, where the original demurrer was only to a part of the bill, though coextensive with the latter.[4] By this method the defendant has been permitted to assign a misjoinder of parties,[5] the disability of a married woman suing improperly in her own name,[6] and also want of jurisdiction,[7] in different cases, under original demurrers for want of equity.

SAME—SPEAKING DEMURRERS.

255. Where a demurrer, in support of the objection urged, states matters of fact that do not appear upon the face of the bill, it is called a "speaking demurrer."

A speaking demurrer is one which introduces some fact or facts in opposition to the bill which do not already appear upon its face,[1] and is in violation of the essential theory upon which the use of the

[2] See Durant v. Redman, 1 Vern. 78, and note; Hook v. Dorman, 1 Sim. & S. 227.

[3] Baker v. Mellish, 11 Ves. 70; Barrett v. Doughty, 25 N. J. Eq. 380; Clark v. Davis, Har. (Mich.) 227; Equitable Life Assur. Soc. of the United States v. Patterson, 1 Fed. 126; and cases cited supra, note 42. After a written demurrer to the whole bill is overruled, the defendant may demur ore tenus to a part only. Wright v. Dame (1840) 1 Metc. (Mass.) 237.

[4] Shepherd v. Lloyd, 2 Younge & J. 490.

[5] Barrett v. Doughty, 25 N. J. Eq. 380.

[6] Garlick v. Strong, 3 Paige (N. Y.) 440.

[7] Barber v. Barber, 5 Jur. (N. S.) 1197.

§ 255. [1] Story, Eq. Pl. § 448. See Davies v. Williams, 1 Sim. 5; Brownsword v. Edwards, 2 Ves. Sr. 243, 245; Brooks v. Gibbons, 4 Paige (N. Y.) 374; Kuypers v. Reformed Church, 6 Paige (N. Y.) 570. Generally, as to speaking demurrers, see Stewart v. Masterson, 131 U. S. 151, 9 Sup. Ct. 682; Union Pac. Ry. Co. v. Meier, 28 Fed. 9; Brooks v. Gibbons, 4 Paige (N. Y.) 374; Tallmadge v. Lovett, 3 Edw. Ch. (N. Y.) 563; Southern Life Ins. Co. v. Lanier, 5 Fla. 110; Black v. Shreeve, 7 N. J. Eq. 440. If the new matter set up is wholly immaterial, it will be disregarded as surplusage, but where the new matter is necessary to present the objection the demurrer will be overruled. See Cawthorn v. Chalie, 2 Sim. & S. 127; Davies v. Williams, 1 Sim. 5.

demurrer is based, i. e. that the complainant, as a legal proposition, is not entitled, upon his own showing and admitting his statement to be true, to the relief he seeks. Thus, where a bill was brought to redeem from a mortgage, and it did not allege possession by the mortgagor within 20 years, except by saying that in or about a certain year the complainant's ancestor died, and soon after the defendant took possession, a demurrer alleging that from the year named, "which was upwards of 20 years before the filing of the bill," the defendant had been in possession, and the complainant was under no disability, and had shown no right to redeem, was overruled, as containing, in the averment of 20 years' possession by the defendant, matter of fact which did not clearly appear on the face of the bill.[2]

ADMISSIONS MADE BY DEMURRER.

256. A demurrer in equity admits for the purpose of the argument on the demurrer, and for that purpose only, all material allegations of fact contained in the bill which are well pleaded; it does not admit allegations of fact not well pleaded, nor matters of inference and argument, nor allegations of conclusions of law or fact.

The effect of the demurrer, as an admission, is solely as to the truth of material facts well pleaded in the bill, and this only for the purposes of the argument.[1] The common-law rule is followed

[2] Edsell v. Buchanan, 4 Brown, Ch. 254. See Brooks v. Gibbons, 4 Paige (N. Y.) 374.

§ 256. [1] On demurrer a bill must be taken as true, and matter in avoidance is not available. Puget Sound Nat. Bank of Seattle v. King Co., 57 Fed. 433. The demurrer does not admit the truth of an averment inconsistent with a written instrument attached to the bill as an exhibit; the exhibit prevails. National Park Bank of New York v. Halle, 30 Ill. App. 17. Cf. North v. Kizer, 72 Ill. 172; Greig v. Russell, 115 Ill. 483, 4 N. E. 780. A demurrer to the bill admits all such matters of fact as are well pleaded, and such only. Newell v. Board of Sup'rs, 37 Ill. 253; Stow v. Russell, 36 Ill. 18; Hickey v. Stone, 60 Ill. 458; Harris v. Cornell, 80 Ill. 54. It admits such facts only as are positively charged; as to matters charged upon information and belief it admits only that the complainant is so informed and does so believe. Walton v. Westwood, 73

here, and matters of inference or argument, or the statement of inferences or conclusions of law, will be disregarded;[2] and the admission made by the party demurring, being for the purposes of the argument only, cannot be used as evidence against him in another suit, or even in the same suit, if his demurrer is overruled.[3] This admission of the facts is necessary, in accordance with the theory of this method of defense, in order to present to the court a naked proposition of law as to the sufficiency of the complainant's statement or charge to sustain the right which he asserts.

Ill. 125. Notwithstanding a demurrer confesses the allegations of the bill, it still is but a confession accompanied by an assertion of all the legal rights of the demurrant as they would exist supposing the bill to be true, and growing out of the facts as therein stated. It is therefore something more than a pro confesso, which is, in effect, equivalent to an answer confessing the bill and asserting no legal right in the defendant. Hence, because the statute of limitations can be set up by demurrer as a defense to the bill, it does not follow that the court should refuse relief on a pro confesso decree, merely because it appears that the statute of limitations, if relied on, would be a bar. The failure to set up the statute is a waiver of it. Patterson v. Ingraham, 23 Miss. 87.

[2] Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476; U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 510, 12 Sup. Ct. 308; Calcot Co. v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695; Gould v. Railroad Co. 91 U. S. 526; Pullman's Palace-Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587, 6 Sup. Ct. 194; Dillon v. Barnard, 21 Wall. 430; Preston v. Smith, 26 Fed. 884; Horsford v. Gudger, 35 Fed. 388; Cornell v. Green, 43 Fed. 105; Greig v. Russell, 115 Ill. 483, 4 N. E. 780; Newell v. Board of Sup'rs, 87 Ill. 253; Com. v. Commissioners of Allegheny, 37 Pa. St. 277; Tennent v. Barksdale (Miss.) 3 South. 80; Stow v. Russell, 36 Ill. 18. Followed by Newell v. Board of Sup'rs, 37 Ill. 253; Johnson v. Roberts, 102 Ill. 655. A plaintiff in a bill in equity is not concluded on demurrer by his allegations of law. Tompson v. Bank (1870) 106 Mass. 128. A demurrer admits only matters of fact positively alleged, and not conclusions of law, or mere pretenses and suggestions, or the correctness of the ascription of a purpose, when not justified by the fact positively alleged. Taylor v. Holmes, 14 Fed. 498. In a bill in equity to enforce rights depending on the construction of a written contract set forth in the bill, the construction alleged, if not the true one, is not admitted by a demurrer. Lea v. Robeson (1858) 12 Gray (Mass.) 280. Nor does a demurrer to a bill which avers that a particular transaction is a mortgage admit that it is so, that being a mere inference. Greig v. Russell, 115 Ill. 483, 4 N. E. 780.

[3] Although a demurrer to a bill admits all facts which are well pleaded, this does not change the rule of pleading that the allegations of the bill must be taken most strongly against the complainant. Dunham v. Village of Hyde Park, 75 Ill. 371. The effect of the admission is substantially the same as at

What allegations of fact fall within the rule as being well pleaded [4] must depend upon the application of the rules of pleading elsewhere noticed; [5] but they must be allegations of fact, not inferences or conclusions either of law or fact, and must be material.

When a bill in equity, to enjoin a judgment at law, sets out newly-discovered evidence which establishes the fact that, at the date of the trial at law, the judgment debtor was discharged from all liability, a demurrer for want of equity is an admission that the debtor was so discharged.[6] But, when the bill contains averments as to the meaning or operation of an instrument which it sets forth, the obligations imposed are not admitted, since they are matters of legal inference only,—conclusions of law upon the construction of the instrument,—and are open to contention.[7]

EFFECT OF ORDER SUSTAINING OR OVERRULING DEMURRER.

257. An order sustaining or overruling a demurrer is interlocutory merely, and must be followed by a final order or decree, to terminate the suit.

258. Where a demurrer to the whole bill is sustained, it is usual, but discretionary with the court, to permit complainant to amend, provided the ground of demurrer is a defect that can be cured by amendment. But if the defect cannot be cured by amendment, or if the complainant refuses to amend, the bill will be dismissed.

259. Where a demurrer to a part only of a bill is sustained, its only effect is to relieve defendant of the

common law. See Shipman, Com. Law Pl. (2d Ed.) § 175. A demurrer is an admission of the truth of matters well pleaded, only for the purpose of testing, judicially, the sufficiency of the pleading, unless the party elects to abide by his demurrer. Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621.

[4] Roby v. Cossitt, 78 Ill. 638.

[5] Ante, pp. 319–352.

[6] Cox v. Railroad Co., 44 Ala. 611.

[7] Dillon v. Barnard, 21 Wall. 430. See ante, c. 4, p. 319, as to the material requisites of the bill.

necessity of answering the part of the bill demurred to, and the suit must be proceeded in as though that part of the bill had never been inserted.

260. Where a demurrer to the whole bill is overruled, the usual practice is to rule the defendant to answer the bill, and, if he neglects to do so, the bill will then be taken pro confesso.

261. Where a demurrer to a part only of the bill is overruled, the complainant must except to the accompanying answer for insufficiency when he wishes to obtain an answer to the part of the bill which was attempted to be covered by the demurrer.

Sustaining Demurrer—Amendment of Bill.

According to the strict former practice, after a demurrer to the whole of a bill had been argued and allowed, the bill was out of court, and could not be regularly amended.[1] But, where a demurrer left any part of the bill unanswered, the whole could be amended, notwithstanding the allowance of the demurrer, for the suit in that case continued in court.[2] But, properly speaking, the bill is not out of court until, upon allowance of the demurrer, the bill is dismissed.[3] "An order allowing or sustaining a demurrer is not a final decree, unless, in terms or effect, it dismisses the bill, and puts the case out of court."[4] The strictness of the former rule has been much relaxed in modern practice, and it is now universally

§§ 257–261. [1] Story, Eq. Pl. § 459; 1 Beach, Mod. Eq. Prac. § 279; Hays v. Heatherly, 36 W. Va. 613, 15 S. E. 223; National Bank v. Carpenter, 101 U. S. 567; Cullison v. Bossom, 1 Md. Ch. 95. A demurrer to an amended bill should be considered and sustained or overruled, not stricken from the files Rowan v. Kirkpatrick, 14 Ill. 1.

[2] Story, Eq. Pl. § 459; Durling v. Hammar, 20 N. J. Eq. 220, 228; Emans v. Emans, 14 N. J. Eq. 114.

[3] Story, Eq. Pl. § 459, note.

[4] Forbes v. Tuckerman, 115 Mass. 115, 119. "If the plaintiff does not obtain leave to amend his bill, and the defendant wishes to put an end to the suit and recover his full costs, he must move to dismiss the bill for want of prosecution." Langd. Eq. Pl. § 96, note; Har. Ch. Prac. (Newl. Ed.) 216.

the rule, under statutes or rules of court, that the court may in its discretion permit the complainant to amend his defective pleading.[5] Leave to amend will invariably be granted where the defect is a merely formal one, as the joinder of an unnecessary party or the misnomer of a necessary one, and, in general, whenever the demurrer opposes the bill on some ground less than that of an entire want of equity.[6] But, where the objection raised by the demurrer cannot be obviated by an amendment, none will be permitted. Thus, if a demurrer goes to the whole equity of the bill,—that is, if the decision of the legal proposition presented involves also a determina-

[5] 1 Beach, Mod. Eq. Prac. § 459; Hays v. Heatherly, 36 W. Va. 613, 15 S. E. 223; Cullison v. Bossom, 1 Md. Ch. 95. In the federal courts the practice is regulated by Eq. Rule 35, which is as follows: "If upon the hearing any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable." See National Bank v. Carpenter, 101 U. S. 567. If plaintiff desires to amend, he should apply for leave; it will not be granted by the court of its own motion, but the bill will be dismissed. McDowell v. Cochran, 11 Ill. 31. See Aylwin v. Bray, 2 Younge & J. 518, note; Tryon v. Improvement Com. Co., 6 Jur. (N. S.) 1324; McElwain v. Willis, 8 Paige (N. Y.) 505. See, also, Walker v. Powers, 104 U. S. 245; Wellesley v. Wellesley, 4 Mylne & C. 554. In the latter case it was stated that, while a matter within the discretion of the court, it was not usual to allow an amendment after sustaining a general demurrer, but the present practice is as stated in the text. See, also, ante, c. 3, p. 100. The court, on overruling a demurrer, need not rule the defendant to answer, but may proceed at once to a decree, at its discretion. Roach v. Chapin, 27 Ill. 194. Followed by Wangelin v. Goe, 50 Ill. 459. A bill should not be dismissed on demurrer unless the defects are not amendable, or the complainant declines to amend. Lamb v. Jeffrey, 41 Mich. 719, 3 N. W. 204. See Merrifield v. Ingersoll, 61 Mich. 4, 27 N. W. 714. On special demurrer to a bill, where the objection may be obviated by simply striking out the objectionable features, the court should give opportunity for amendment, and it is error to dismiss the bill. Bigelow v. Sanford, 98 Mich. 657, 57 N. W. 1037.

[6] See Cunningham v. Pell, 6 Paige (N. Y.) 655; McElwain v. Willis, 3 Paige (N. Y.) 505; Garlick v. Garlick, Id. 440; Young v. Bilderback, 3 N. J. Eq. 206; Plumley v. Plumley, 8 N. J. Eq. 511; Allen v. Turner, 11 Gray (Mass.) 436; Wright v. Wright, 8 N. J. Eq. 143. And see ante, c. 3, p. 101. Leave to amend may be refused where the case is one of hardship upon the defendant, and the complainant had full opportunity to present the new matter originally. Dowell v. Applegate, 7 Sawy. 232, 7 Fed. 881. See, also, Tyler v. Bell, 2 Mylne & C. 89.

tion of the complainant's right to the relief sought,—permission to amend will rarely be given.[7] In cases where the defect in the bill cannot be cured, and an amendment is not permitted, or where the plaintiff refuses to amend and elects to stand by his pleading, a final order dismissing the bill will be entered, and the suit is at an end. Where the demurrer is to a part only of the bill, the only effect of sustaining it is to relieve the defendant of the necessity of answering the part of the bill demurred to, and the suit must be proceeded in precisely as though that part of the bill had never been inserted.[8]

Overruling Demurrer.

Where a demurrer to the whole bill is overruled, it is the usual practice to allow or require the defendant to file an answer.[9] "In

[7] It seems that leave will be granted where there is a defect as to parties, or an omission or mistake of some fact or circumstance connected with, but not forming part of, the substance of the bill. See Seymour v. Dock Co., 17 N. J. Eq. 169; Swift v. Eckford, 6 Paige (N. Y.) 22; March v. Mayers, 85 Ill. 177; and, as a special case, see Hall v. Fisher, 3 Barb. Ch. (N. Y.) 637. "The question of amendments in chancery proceedings is one very much in the discretion of the court, if there be no peremptory rule of practice limiting that discretion, whether such rule be prescribed by statute, or is founded in the general usage and practice of courts of equity. We believe it to be a rule in chancery, when a demurrer going to the merits of the whole bill is sustained for want of equity, it is not the practice to allow amendments so as to make a new case with new parties. Verplanck v. Insurance Co., 1 Edw. Ch. (N. Y.) 46; Pratt v. Bacon, 10 Pick. (Mass.) 123; Puterbaugh v. Elliott, 22 Ill. 157." March v. Mayers, 85 Ill. 177, 178. See, also, Lefew v. Hooper, 82 Va. 946, 1 S. E. 208.

[8] When there is a demurrer to the whole bill, and also to part, and the latter only is sustained, the proper decree is to dismiss so much of the bill as seeks relief in reference to matters adjudged to be bad, overrule the demurrer to the residue, and direct the defendant to answer thereto. Powder Co. v. Powder Works, 98 U. S. 126.

[9] See Forbes v. Tuckerman, 115 Mass. 115; Miller v. Davidson, 8 Ill. 518. In Maine it has been held that the order overruling a demurrer should be also that the defendant answer over (Lambert v. Lambert, 52 Me. 544); but in Illinois it is held to be a matter within the discretion of the court whether the defendant shall be allowed to answer (Iglehart v. Miller, 41 Ill. App. 439); and in New Jersey, though usually allowed to answer, he cannot file a plea except under a special order, and where the plea, if true, would be a bar to the relief sought. See White v. Dummer, 2 N. J. Eq. 527; Seeley v. Price, 5 N. J. Eq. 231; Kirkpatrick v. Corning, 39 N. J. Eq. 22. As to the federal practice, see Eq. Rule 35.

equity, the court never pronounces a decree against the defendant on overruling his demurrer, there being no answer in, but must award a rule to answer, before the bill can be taken for confessed." [10] The reason is that a demurrer in equity does not admit the truth of the bill; it merely assumes the truth for the sake of argument. If it be overruled, therefore, it does not follow that the complainant is entitled to a decree. He is not so entitled until the bill is proved or taken pro confesso.[11] As has been seen, a demurrer is essentially an excuse for not answering. If, therefore, the demurrer is overruled, and the defendant nevertheless neglects to answer, the bill will be taken pro confesso, or the complainant may have an attachment to compel an answer.[12] Where the demurrer is to a part only of the bill, it has been seen that it must be accompanied by a plea or answer to all the other parts of the bill.[13] If, therefore, such demurrer be overruled, the bill will still be partially covered by the plea or answer, and cannot be taken pro confesso, even if defendant files no additional defense. In such case, the complainant, if he wishes a further answer or discovery as to the matters attempted to be covered by the demurrer, must except to the answer already put in for insufficiency.[14] "If a demurrer should be overruled on argument, because the facts do not sufficiently appear on the face of the bill, defense may be made by plea, stating the facts necessary to bring the case truly before the court, although it has been said that the court will not permit two dilatories; and, after a plea overruled, it is said that a demurrer has been allowed, bringing before the court the same question, in substance, as was agitated in arguing the plea. But, after a demurrer has been overruled, a second demurrer will not be allowed; for it would be, in

[10] Hays v. Heatherly, 36 W. Va. 613, 15 S. E. 223, 231. See, also, Lambert v. Lambert, 52 Me. 544. The overruling of a demurrer to a bill, without assigning any reason therefor, does not determine finally the sufficiency of the bill, but only that there is sufficient equity upon its face to require an answer (Battle v. Street, 85 Tenn. 282, 2 S. W. 384); and the same is true, in general, of the decree of an appellate court (Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. 719).

[11] Langd. Eq. Pl. § 96; Hays v. Heatherly, 36 W. Va. 613, 15 S. W. 223, 226.

[12] Barb. Ch. Prac. 112.

[13] See ante, c. 3, p. 73.

[14] Kuypers v. Reformed Church, 6 Paige (N. Y.) 570.

effect, to rehear the case on the first demurrer, as, on the argument of a demurrer, any cause of demurrer, although not shown in the demurrer as filed, may be alleged at the bar, and, if good, it will support the demurrer." [15]

CONCLUSIVENESS—FINAL ORDER OR DECREE ENTERED ON DEMURRER.

262. A decree dismissing a bill in chancery rendered on a demurrer which embraces the whole merits of the case will support a decree of res judicata; but where it amounts merely to a decision that the complainant has not shown facts entitling him to relief, and not to a decree upon the merits, it is no bar to a subsequent proceeding upon the same cause of action.[1]

"There can be no doubt that a judgment rendered upon a demurrer is equally conclusive, by way of estoppel, of the facts confessed by the demurrer, as would be a verdict and judgment finding the same facts. But a judgment on a demurrer, based on merely formal and technical defects, is no bar to a suit on an amended declaration correctly setting forth a good cause of action. * * * But, on the other hand, a judgment on a demurrer which goes to the merits, disposing of the whole cause of action, is affirmed by all the authorities to be a bar to a subsequent suit upon the same claim or demand, as completely so as though the action had been submitted to a jury, and a verdict and judgment had thereon." [2]

[15] Story, Eq. Pl. § 460. See, also, Booth v. Stamper, 10 Ga. 109, 113; Baker v. Mellish, 11 Ves. 68, 70; Rowley v. Eccles, 1 Sim. & S. 511. And see Moore v. Armstrong, 9 Port. (Ala.) 697; Bosanquet v. Marsham, 4 Sim. 573.

§ 262. [1] 2 Black, Judgm. § 707.

[2] 2 Black, Judgm. § 707; Gray v. Gray, 34 Ga. 499; Carey v. Giles, 10 Ga. 9; City Bank of New Orleans v. Walden, 1 La. Ann. 46; Parker v. Spencer, 61 Tex. 155; Felt v. Turnure, 48 Iowa, 397. Where a demurrer is filed to a bill for want of equity, the decision thereon is conclusive in all subsequent proceedings in the same case, until properly reviewed and reversed. "The equity of the bill was thus res judicata in the cause, and could not be disputed, if the facts alleged in it were proved on the hearing." Kilpatrick v. Strozier, 67 Ga. 247. See, also, Boyd v. Sims, 87 Tenn. 771, 11 S. W. 948. A final order or decree

The same general principles apply in equity as well as at law. The United States supreme court, investigating the whole subject with care and thoroughness, has reached the conclusion that the authorities establish the two following propositions: "First. That a judgment rendered upon demurrer to the declaration, or to a material pleading setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is that facts thus established can never after be con-

entered upon a general demurrer for want of equity is an adjudication upon the merits so far as the bill goes, and is final and conclusive. In the language of the United States supreme court, "a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial, except at the discretion of the court, and, if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action." Alley v. Nott, 111 U. S. 472, 475, 4 Sup. Ct. 495. See, to the same effect, Baker v. Frellsen, 52 La. Ann. 822; Lamb v. McConkey, 76 Iowa, 47, 40 N. W. 77; City of Los Angeles v. Mellus, 58 Cal. 16. There are many cases which hold that a judgment on a demurrer interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action will not bar a suit on a new declaration which contains the averment for want of which the former complaint was held not to constitute a cause of action. See Gilman v. Rives, 10 Pet. 298; Gould v. Railroad Co., 91 U. S. 526; Moore v. Dunn, 41 Ohio St. 62; Grotenkemper v. Carver, 4 Lea (Tenn.) 375; Gerrish v. Pratt, 6 Minn. 53 (Gil. 14). In Birch v. Funk, 2 Metc. (Ky.) 544, the court said, of a judgment on such a demurrer: "That judgment merely pronounced the former petition insufficient. It decided that the case presented by that petition was without merit, and to that extent only can it be said to have been a decision upon the merits. But the facts set out in the subsequent case have never been litigated or passed upon in any way, and it is therefore illogical and an abuse of terms to say that the judgment relied upon is a judgment upon the merits of the present case, and for that reason must operate as a bar to any relief." "But if the decision was on account of some inherent vice or defect in the case shown by the complaint, rather than for any lack of proper allegations, it is difficult to resist the conclusion that the judgment would be a complete bar to any further suit upon the same transaction or state of facts." 2 Black, Judgm. § 709.

tested between the same parties or those in privity with them. Second. That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. * * * But it is equally well settled that, if the plaintiff fails on demurrer in his first action for the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action." [3] We may cite a few cases in illustration of the practical working of these rules. Where a demurrer challenges the validity of the contract which forms the basis of the complainant's claim, and is sustained, it is a bar to a subsequent action on the contract.[4] So a decree dismissing a bill on demurrer, on the ground of lapse of time or laches, is on the merits, and will bar another suit upon the same cause.[5] So an order of court in these words: "Upon motion of defendant's counsel, ordered that this cause be dismissed, upon the ground that the allegations in the petition do not make a case upon which the plaintiffs can recover,"—is held to be a judgment upon demurrer to the declaration, and operates as a complete bar to a second suit for the same cause of action.[6] But, in order to have this conclusive effect, it is necessary that a final order or decree should have been rendered upon the decision of the demurrer. Where the court has announced a decision sustaining a demurrer, which in effect defeats the complainant's suit, and the entry of demurrer sustained has been made on the docket, but has not been followed by a formal dismissal of the suit, thus putting

[3] Gould v. Railroad Co., 91 U. S. 526, 533.
[4] Robinson v. Howard, 5 Cal. 428.
[5] Parkes v. Clift, 9 Lea (Tenn.) 524.
[6] Kimbro v. Railway Co., 56 Ga. 185.

the case finally out of court, the complainant may dismiss or discontinue his suit, and bring another on the same cause of action.[7]

GROUNDS OF DEMURRERS.

263. Objections to bills which may be taken by demurrer will be considered with reference to

(a) Original bills for relief (p. 384).

(b) Original bills not for relief (p. 404).

(c) Bills not original (p. 405).

DEMURRERS TO ORIGINAL BILLS FOR RELIEF.

264. Demurrers to original bills for relief may be either

(a) To both the relief and discovery (p. 384).

(b) To the relief alone (p. 386).

(c) To the discovery alone (p. 400).

SAME—DEMURRERS TO BOTH RELIEF AND DISCOVERY.

265. Any objection good to the relief will also be good to the discovery, provided:

PROVISO—(a) The discovery is merely incidental to the relief sought; and

(b) The demurrer is directed to both the relief and discovery.

In England it is the rule, without qualification, that an objection good to the relief is also good to the discovery, for a plaintiff is bound to shape his bill according to what he has a right to pray. Therefore, if a plaintiff prays relief when he is entitled only to discovery, a demurrer will lie to the whole bill. But in America, if the bill can be sustained as a bill of discovery, an objection good as to the relief sought is not necessarily good as to the discovery.[1]

[7] See Black, Judgm. § 707; State v. Jenkins, 70 Md. 472, 17 Atl. 392.

§§ 263–265. [1] "This is a demurrer to the whole bill, and includes both the relief and discovery. The causes of demurrer assigned, which together must be co-extensive with the demurrer, are in part to the relief and in part to the discovery. And then by that rule, although the demurrer might be good to the

A complainant is not to be prejudiced by having asked too much. "Where the discovery sought by a bill can only be assistant to the relief prayed, a ground of demurrer to the relief will also extend to the discovery; but if the discovery have a further purpose the complainant may be entitled to it, though he has no title to the relief." [2] "The rule is that, where a bill prays discovery and relief, a demurrer well taken as to the relief holds good as to discovery also, provided the discovery is incidental to the relief"; [3] and provided, further, that the objection is pleaded to both the relief and discovery.[4] It is well settled that, upon a bill for discovery and

discovery, yet, being bad in part, it must be wholly overruled. The only exception to this rule, if there is any, is where a bill for discovery also prays relief, and a general demurrer is held good to the relief, but not to the discovery. In such case the former English decisions, and the decisions in America, hold that the demurrer will not be a bar to the discovery. The modern English cases hold that it will, on the ground that, the discovery being only the means for the relief, if that relief cannot be granted the discovery is of no avail. 1 Story, Eq. Jur. § 70; 1 Daniell, Ch. Prac. 569." Metler's Adm'rs v. Metler, 18 N. J. Eq. 270, 273; Buerk v. Imhaeuser, 8 Fed. 457.

[2] Manning v. Drake, 1 Mich. 34. See, also, Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 294, 297; Mitchell v. Green, 10 Metc. (Mass.) 101; Pease v. Pease, 8 Metc. (Mass.) 395. A bill cannot be maintained for discovery if it cannot be maintained for relief, and does not show that any discovery is required in aid of proceedings at law. Pool v. Lloyd (1843) 5 Metc. (Mass.) 525; Ahrend v. Odiorne (1875) 118 Mass. 261; Walker v. Brooks (1878) 125 Mass. 241. Where a party entitled to discovery only brings a bill for relief and discovery, a demurrer to the whole bill will be overruled. It should be to the relief only. Wright v. Dame (1840) 1 Metc. (Mass.) 237; Conant v. Warren (1856) 6 Gray (Mass.) 562.

[3] Souza v. Belcher, 3 Edw. Ch. (N. Y.) 117, 118. See Venner v. Railroad Co., 28 Fed. 581; Preston v. Smith, 26 Fed. 884; Emery v. Bidwell, 140 Mass. 271, 3 N. E. 24; Walker v. Locke, 5 Cush. (Mass.) 90. When a bill in equity seeks special and general relief, and also a discovery, and relief is the principal object, and discovery is sought merely as incidental to the relief, if the plaintiff shows no title to the relief sought a demurrer lies to the whole bill. Pool v. Lloyd (1843) 5 Metc. (Mass.) 525. And see Mitchell v. Green (1845) 10 Metc. (Mass.) 101. When a bill seeks both discovery and an accounting, the discovery must be regarded prima facie as incidental to the accounting, and if there is no right to an accounting the bill will be held bad upon demurrer. Everson v. Assurance Co., 68 Fed. 258, affirmed in 18 C. C. A. 251, 71 Fed. 570.

[4] Where the complainant upon the whole case as stated in the bill is not

relief, the defendant may, if he chooses, answer and make the discovery sought, and at the same time demur to the relief only; and, if the defendant demurs to the relief only, he is bound to accompany his demurrer with an answer giving the discovery, for, as has been seen, all parts of the bill must be met either by a demurrer, plea, or answer.[5]

Specific Grounds of Objection.

All objections good to both relief and discovery will be included in the class of objections good to the relief. Objections good only to the discovery, though they may consequently affect the relief, do not necessarily do so, for non constat the complainant may be able to prove his case by other evidence. Accordingly, when objections which are good, considered solely with reference to the relief sought, have been discussed, objections good to both relief and discovery will have been sufficiently considered. Objections good to the discovery alone will be separately considered, thus completing the consideration of the grounds of demurrers to original bills for relief.

SAME—DEMURRERS TO THE RELIEF ALONE.

266. A demurrer to the relief is one which objects to the bill on the ground that, by reason of some defect apparent upon its face, the complainant is not entitled to the relief sought.[1]

267. The objections properly taken by demurrers of this class are:

(a) To the jurisdiction of the court (p. 386).

(b) To the person of the complainant (p. 390).

(c) To the frame or form of the bill (p. 392).

(d) To the substance of the bill (p. 395).

entitled either to discovery or relief, the defendant should demur to the relief as well as to the discovery. Kuypers v. Reformed Church, 6 Paige (N. Y.) 570.

[5] The questions discussed in this section also arise in the case of pleas, and the same considerations are applicable. See post, p. 452.

§§ 266–268. [1] "A demurrer is applicable to any defense which may be made out from the allegations in a bill; but the most ordinary grounds of demurrer are want of jurisdiction, want of equity, multifariousness, and want of parties. By demurrer a defendant may properly insist upon staleness of claim, the

268. OBJECTIONS TO THE JURISDICTION—Demurrers to the jurisdiction of the court are those which object that the court in which the bill is filed is without jurisdiction to proceed in the cause, and, in general, now rest upon three principal grounds:

(a) That the subject of the suit is not within the jurisdiction of a court of equity.

(b) That some other court of equity is vested with the proper jurisdiction.

(c) That some other court is vested with the proper jurisdiction.

Demurrers of the class above mentioned are those which oppose the granting of the relief sought because the bill shows upon its face that the court in which it is filed is without jurisdiction to take cognizance of the particular controversy. The proper jurisdiction may be wanting in either of the three cases above mentioned, which seem to include all that need be enumerated, though a high authority adds, as a further class, cases where the subject-matter is not cognizable by any municipal court of justice,[2] and which is necessarily included in the class first given.[3]

Cases without the Jurisdiction of Equity.

It is a settled doctrine that, whenever there is no sufficient ground shown in the bill for the interference of a court of equity, the defendant may demur to the bill for want of jurisdiction.[4] This condition may arise in one or more of several ways. Thus, the bill may fail to state facts which bring the controversy within the essential limitations of equity jurisdiction, or may set forth facts which clearly show that it is without such limitations,—as, for instance, that the complainant has a plain, adequate, and complete remedy at

statute of limitations, and long acquiescence in his adverse possession and claim." Taylor v. Holmes, 14 Fed. 498, 501. Technical objections to a bill in equity are available only where they are taken by demurrer. McCloskey v. McCormick, 44 Ill. 336.

[2] Story, Eq. Pl. (10th Ed.) § 467.

[3] Post, c. 7, p. 454.

[4] Story, Eq. Pl. § 472; 2 Madd. Ch. Pr. (4th Am. Ed.) 287, 288.

law;[5] or, if the court is one of limited equity powers, the statement may fail to disclose upon its face that it has jurisdiction over the subject-matter in controversy;[6] or that the bill shows upon its face that the defendants reside without the jurisdiction, as in another state;[7] or, in the federal courts, that the defendant is shown to be a nonresident of the district in which the suit is brought,[8] or that the value of the subject-matter in controversy, as stated, is insufficient to confer jurisdiction.[9]

The objection of want of jurisdiction may be asserted also where, upon the face of the bill, it appears that there is no remedy, either at law or in equity, as where a person seeks to recover money voluntarily paid under threat of legal proceedings for its recovery, even though the bill recites that the payment was thus made, and under a protest and notice that he would seek relief in equity;[10] and also where the case stated is within the purview of the statute of limitations, and the bill fails to also state that the case is one of the exceptions to the statute.[11] The objection for want of jurisdiction may be taken either by general or special demurrer.[12]

[5] See Mitf. Eq. Pl. (by Jeremy) 112-151; Fetter, Eq. p. 10; Beach, Mod. Eq. Prac. §§ 101-104, and cases cited; ante, p. 8; post, c. 7, p. 454; Red Jacket Tribe v. Hoff, 33 N. J. Eq. 441. See, also, Naudain v. Ormes, 3 MacArthur (D. C.) 1. A bill showing on its face that there is an adequate remedy at law is obnoxious to a demurrer for want of equity. Winkler v. Winkler, 40 Ill. 179. Followed by Wangelin v. Goe, 50 Ill. 459.

[6] Stephenson v. Davis, 56 Me. 73. The circuit courts of the United States are thus of limited jurisdiction, though inferior courts, in the language of the constitution; and, while they are not thereby subject to the narrow rules of the English chancery procedure as to courts denominated "inferior," their proceedings cannot be deemed valid unless facts showing the jurisdiction in the particular case appear upon the record. Turner v. Bank, 4 Dall. 8. See, also, Godfrey v. Terry, 97 U. S. 171.

[7] See Stephenson v. Davis, 56 Me. 73.

[8] See Miller-Magee Co. v. Carpenter, 34 Fed. 433.

[9] Story, Eq. Pl. §§ 500-502.

[10] Kemp v. Pryor, 7 Ves. 237.

[11] Story, Eq. Pl. 484.

[12] Stephenson v. Davis, 56 Me. 73; Boston Water-Power Co. v. Boston & W. R. Corp., 16 Pick. (Mass.) 512.

Where Another Court of Equity has Jurisdiction.

Demurrers of this kind were formerly rare, and it is believed are not now often used, except in the federal courts, whose limited jurisdiction calls for a statement of the necessary facts upon the record.[13] A controversy might arise, also, where a federal court, from the nature of local laws, would deem it proper to remit the question to a state court for decision;[14] and so where the citizenship of the parties as shown by the bill would prevent a federal court from taking cognizance of the suit, and an equity court of the state, if all parties were residents of that state, would be the proper tribunal; but it does not necessarily render a bill demurrable, in federal practice, that one of two complainants suing on a common right is a citizen of the same state as the defendant, if the right is not a joint one.[15] The fact that the property affected by the controversy is not within the jurisdiction does not constitute a sufficient objection in such cases, as a court of equity acts against the person.

Where Another Court has Jurisdiction.

That another court, not a court of equity, possesses jurisdiction over the controversy, is a sufficient ground of demurrer, if the fact appears upon the face of the bill, and this objection is not confined to cases cognizable at common law. It may arise where another court has an exclusive jurisdiction; or a competent, though not an exclusive, jurisdiction; or a mixed jurisdiction, embracing the subject-matter.[16] Thus, a court of equity will not, in general, entertain a suit to determine the validity of a will devising personal estate, such matters being generally exclusively within the cognizance of courts of probate and others of like jurisdiction;[17] and, where any other court of ordinary jurisdiction is competent to dispose

[13] See Turner v. Bank, 4 Dall. 8; Godfrey v. Terry, 97 U. S. 171.

[14] See Story, Eq. Pl. (10th Ed.) § 486; Massie v. Watts, 6 Cranch, 148; Mead v. Merritt, 2 Paige (N. Y.) 402. See, also, Steves v. Appleton, 4 Cliff. 265, Fed. Cas. No. 13,394.

[15] Nebraska City Nat. Bank v. Nebraska City Hydraulic Gaslight & Coke Co., 14 Fed. 763.

[16] Story, Eq. Pl. § 490.

[17] Story, Eq. Pl. § 490.

of the controversy, as where the subject-matter is within the jurisdiction of a court of admiralty, or bankruptcy, a court of equity cannot ordinarily interfere.[18]

269. OBJECTIONS TO THE PERSON OF COMPLAINANT—A demurrer to the person of the complainant is one which objects to his right to maintain the bill for one of two reasons:

(a) That the complainant has not legal capacity to sue; or

(b) That he has no title to the character in which he sues.

Demurrers to the person, as they are called, are taken where one of the two grounds above mentioned appears upon the face of the bill, and in their nature are somewhat analogous to pleas in abatement at common law. The nature and effect of the objection made is also the same as at common law, being directed, not to the right to sue, but to the manner in which it is asserted, either for the reason that the person asserting such right is disabled from doing so in his own name, or that the representative capacity in which he appears is one which he cannot assume in the particular case.

Want of Capacity to Sue.

Demurrers of this class rest upon the ground that it appears on the face of the bill that the person named therein as complainant is under some legal disability which renders him incapable of suing in our courts in his own name, as where it thus appears that he is an infant, or non compos mentis, or, in some states, a married woman,[1] and no person is named as his next friend, or committee, by whose aid, as we have already seen, the suit must in such cases be brought.[2] The objection extends to the whole bill, and may be taken as well to bills for discovery as to those for relief, since it would be manifestly unjust that a defendant should be compelled to answer a bill exhibited by those whose property is not under their control, and who therefore could not be made answerable for

[18] Coop. Eq. Pl. 126–128; The Noysomhed, 7 Ves. 593.

§ 269. [1] Story, Eq. Pl. § 494.

[2] Ante, c. 2, p. 47; Story, Eq. Pl. § 494.

costs, if upon a full answer the defendant became entitled to them.[3] The cases where a person is incapacitated from suing in his own name have already been fully noticed.[4]

Want of Title to Character Assumed.

While it has been sometimes considered that an objection of this character is the proper subject of a plea, rather than of a demurrer, the latter method seems upon principle to be the proper one, if the defect clearly and positively appears upon the face of the bill.[5] If it should thus appear that the complainant sues as an administrator under letters of administration granted by a foreign state or country, the bill will be demurrable, since the authority thus conferred cannot extend beyond the limits of the state or sovereignty granting it,[6] and for this purpose, as in many other cases of legal distinctions, one state is foreign to another.[7] So if a voluntary association of individuals sues in an assumed corporate name without being legally incorporated, it being the exclusive prerogative of the state or government to create such corporations and invest them with the power of suing and otherwise acting by a corporate name.[8] If, however, the complainant named is a fictitious person, a more summary method is adopted; and the proceedings may be stayed, or the bill ordered taken off the file, and the solicitor encouraging or permitting such action subjected to the payment of costs.[9]

In Indiana and New Jersey it has been held that the objection that a corporation has no legal existence cannot be taken under a general demurrer for want of equity.[10]

[3] Story, Eq. Pl. § 494.

[4] Ante, c. 2, p. 46.

[5] Coop. Eq. Pl. 164; Story. Eq. Pl. 496.

[6] Story, Eq. Pl. 496. See, also, Duchesse d'Auxy v. Porter, 41 Fed. 68.

[7] See Warder v. Arell, 2 Wash. (Va.) 282; Ripple v. Ripple, 1 Rawle (Pa.) 386; Cherokee Nation v. Georgia, 5 Pet. 1.

[8] See Lloyd v. Loaring, 6 Ves. 773; and see Cheraw & C. R. Co. v. White, 14 S. C. 51; Board, etc., of German Reformed Church in America v. Von Puechelstein, 27 N. J. Eq. 30; Wiles v. Trustees, etc., 63 Ind. 206.

[9] Coop. Eq. Pl. 165; Titterton v. Osborne, 1 Dickens, 350.

[10] See Wiles v. Trustees, 63 Ind. 206; Board, etc., of German Reformed Church in America v. Von Puechelstein, 27 N. J. Eq. 30.

270. OBJECTIONS TO THE FORM OR FRAME OF THE BILL—A demurrer of this kind is one which opposes the bill by reason of its insufficiency in form, and may be taken upon the following grounds:

(a) Defects in form, such as uncertainty of allegations, or omission of prescribed formularies or formal requisites.

(b) Multifariousness.

(c) Want of proper parties or misjoinder of parties.

Objections to the frame and form of the bill are also generally presented by demurrer, and are usually included in one of the classes above specified.

Formal Defects.

The formal defects apparent upon the face of the bill for which a demurrer will generally lie are the want of proper certainty in the allegations of fact which the bill contains, or the omission of some prescribed formulary,[1] or of some formal requisite, such as the signature of counsel, or of an affidavit, when the latter is necessary.[2] The first of these defects is noticed elsewhere,[3] but it may be mentioned here that the rules as to certainty in equity pleading are substantially the same as at common law; and, in general, any irregularity in the frame or structure of the bill, of any kind, as if the bill is brought contrary to the usual procedure of the court in which it is filed, is ground for demurrer.[4] Want of certainty may be cured, however, by an accompanying allegation that the

§ 270. [1] Kirkley v. Burton, 5 Madd. 378.

[2] The court will not generally listen to such defects at the hearing, if the case stated is such that it can properly proceed to a decree; but when, at that time, it appears that there is a formal defect, and that certain facts have occurred since the filing of the bill which are essential to a proper decree, it may, in a proper case, stay proceedings and allow a supplemental bill to be filed to present such facts. See Mutter v. Chauvel, 5 Russ. 42. The proper method in which to take advantage of failure to number paragraphs of a bill in equity, as required by the Code (Pub. Gen. Laws, art. 16, §§ 131–133), is by motion in the nature of a ne recipiatur, and not by demurrer. Chew v. Glenn, 82 Md. 370, 33 Atl. 722.

[3] Ante, p. 322.

[4] Mitf. Eq. Pl. (by Jeremy) 206, 207.

complainant, for good and specified reasons, is unable to state his facts with greater accuracy;[5] and, where a bill consists of a great variety of circumstances, the evidence of which may sustain the relief sought, with some modifications, a demurrer will not properly lie, since to sustain a demurrer there must be, as has been aptly said, a neat, short point, amounting to an absolute denial of the complainant's title to any relief.[6]

Multifariousness.

The defects falling under this head are divided into three classes: (1) The misjoinder of causes of suit, or demands, in the same bill,—the fault known as "duplicity" at common law; (2) the improper joinder of persons as complainants; and (3) cases where a party is made defendant to a record, when he has only a slight interest in the case made by such record, and the parties would thus be put to useless expense. The former has been elsewhere considered,[7] and the two latter, while being what is more familiarly understood as "multifariousness," seem to be more properly a misjoinder of parties.[8]

An objection to a bill as multifarious, if not raised by demurrer, will be considered as waived, and, if presented by answer, the court has discretionary power, on the hearing, to sustain or disregard the objection.[9] And, on a demurrer for this cause, a portion of the

[5] Wright v. Plumptre, 3 Madd. 481, 490.

[6] Brooke v. Hewitt, 3 Ves. 253.

[7] Ante, c. 4, p. 339. See Hayes v. Dayton, 18 Blatchf. 420, 8 Fed. 702.

[8] Post, p. 394; ante, c. 2. Where a demurrer to a bill on the ground of multifariousness is sustained as to a part of the bill, all that portion of the bill not objectionable on that ground remains in court, and the complainant may proceed upon it as if no demurrer had been interposed. Durling v. Hammar, 20 N. J. Eq. 220.

[9] Labadie v. Hewitt, 85 Ill. 341. Multifariousness is ground for a general demurrer. Board of Sup'rs of Whiteside Co. v. Burchell, 31 Ill. 68. When defendants desire to take advantage of multifariousness, the proper practice is to demur. But if they reserve the privilege of making the objection at the hearing, when the expenses of taking proofs have been incurred, and the court put to the trouble of a full discussion of the case, they cannot complain if their objection be disregarded. At that stage of the case it is for the court, and not the party, to take advantage of multifariousness; and, unless the nature of the case be such that justice cannot be done upon the pleadings and evidence as then presented, the demurrer at the hearing will be overruled. Payne v. Avery, 21 Mich. 524.

bill, which asks relief not within the power of the court to grant, may be laid out of view altogether, and the residue sustained, if unobjectionable.[10]

Want of, Defect of, or Misjoinder of Parties.

Whenever the want of proper parties appears upon the face of the bill, it is a good ground for demurrer,[11] though the objection, except in the case of formal or nominal parties, may also be taken by answer, or at the hearing;[12] and the court will, in the latter case, generally allow the new parties to be brought in by amendment or by supplemental bill, if substantial justice between the parties already before the court requires it.[13] When complainants are improperly joined, all the defendants, if there are more than one, may demur;[14] but, if there is a misjoinder of defendants, objection can only be taken by those improperly joined.[15] A demur-

[10] Snavely v. Harkrader, 29 Grat. (Va.) 112.

[11] See Cockburn v. Thomas, 16 Ves. 321, 325; Christian v. Crocker, 25 Ark. 327. The absence of a necessary party to any part of the relief prayed for is a good objection on demurrer, though the prayer is in the alternative (Penny v. Watts, 2 Phil. Ch. 149); but when a bill combines separable subjects, and demands different modes of relief against defendants not having a community of interest in all or any of the subjects, and against whom the complainant does not assert a common right, a demurrer to it should be sustained (Roberts v. Starke, 47 Miss. 257). And a bill will not be demurrable where, in seeking relief as to a trust fund which has been maladministered, as its principal ground, it joins as defendants parties who have not been jointly concerned in every act of wrong, there being a series of acts contributing to the injury complained of having relation to the trust and produced by the same fraudulent intent. Garner v. Thorn, 56 How. Prac. (N. Y.) 452. See Boon v. Pierpont, 28 N. J. Eq. 7.

[12] Robinson v. Smith, 3 Paige (N. Y.) 222. See, also, Wormley v. Wormley, 8 Wheat. 451. The objection comes too late at the hearing. Trustees of Village of Watertown v. Cowen, 4 Paige (N. Y.) 510.

[13] Milligan v. Mitchell, 1 Mylne & C. 433. See Eagle v. Beard, 33 Ark. 497; ante, p. 290; c. 3, p. 104. A dismissal of the bill for this defect would be without prejudice. See Stafford v. City of London, 1 P. Wms. 428; Russell v. Clarke's Ex'rs, 7 Cranch, 69. Nonjoinder of parties is not ground for a general demurrer to a bill, as it may be cured by amendment. Hand v. Dexter, 41 Ga. 454.

[14] King of Spain v. Machado, 4 Russ. 225. A bill in equity relating to several distinct contracts, as to some of which there is no want of parties, is only demurrable as to the residue. Weston v. Blake, 61 Me. 452.

[15] Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106; Bigelow v. Sanford, 98 Mich. 657, 57 N. W. 1037. It was questioned in an English case whether misjoinder

rer for want of necessary parties must show who are the proper parties with sufficient accuracy to point out to the complainant the objection made, and thus enable him to amend by making proper parties;[16] and, in case of misjoinder of complainants, if the objection is not taken by demurrer, the court will not regard it at the hearing unless it would materially affect the propriety of the decree.[17]

271. OBJECTIONS TO THE SUBSTANCE OF THE BILL—A demurrer of this class is one which opposes the complainant's right to maintain the suit, by reason of some apparent defect in the substantial and material allegations of fact contained in the bill. It may be taken on one or more of the following grounds:

(a) That the complainant has no interest in the subject-matter of the suit.

(b) That the defendant is not answerable to him respecting the same.

(c) That the defendant is without interest in the same.

(d) That the complainant shows no title or equity to the relief which he seeks.

(e) That the value of the subject-matter in controversy is unworthy of the dignity of the court.

(f) That the bill does not embrace all that the controversy properly includes, and leaves the defendant liable to future litigation.

(g) That the complainant's right to sue has been barred by laches or by the statute of limitations.

(h) That another suit is pending between the same parties, upon the same cause of action.

of a co-defendant was in any case a ground of demurrer. Pringle v. Crooks, 3 Younge & C. 666.

[16] Pyle v. Price, 6 Ves. 779, 780; Attorney General v. Jackson, 11 Ves. 365, 369; Chambers v. Wright, 52 Ala. 444; Parker v. Cochran (Ga.) 22 S. E. 961.

[17] Trustees of Village of Watertown v. Cowen, 4 Paige (N. Y.) 510. See, also, Raffety v. King, 1 Keen, 619.

In examining demurrers which oppose the bill on the ground that defects in substance appear upon its face, it will be unnecessary here to notice more than the four last instances above given, the preceding cases having been already considered in the explanation of the substantial requisites of the bill.[1] As a title or interest in the subject-matter in controversy, and a right to sue concerning it, must exist in the complainant, and an interest in such subject-matter, and a liability to the complainant in regard thereto, in the defendant, in order to sustain an original bill for relief in equity, it is clear, from the principles already stated, that, if the absence of one or more of these requisites appears upon the face of the bill itself, the appropriate remedy is by a demurrer. It may also be stated here that, in general, if it appears upon the face of the bill that for any reason whatever, founded on the substance of the case as stated, the complainant is not entitled to the relief he prays for, the defendant may demur.[2]

Value of Subject-Matter.

It was an ancient rule of equity procedure, which seems to have been recognized in the courts of this country so far as they have been called upon to express an opinion, that a court of equity would not take cognizance of a suit where the subject-matter involved was so trivial in value as to render it beneath the notice of the court, or, as it is expressed, unworthy of its dignity;[3] and, when such a defect appears upon the face of the bill, it is ground for demurrer, the reason being that courts of equity sit to administer justice in matters of grave interest to the parties, and not to gratify passion or curiosity, or to encourage vexatious and unnecessary litigation.[4] The rule in England was not to entertain a bill where the value of the subject was under £10 sterling, or 40 shillings per annum in land, except in cases of charity, fraud, or those involving perma-

§ 271. [1] Ante, c. 4, p. 319.

[2] Story, Eq. Pl. (10th Ed.) § 526. But a demurrer for want of equity will not lie to a bill that is not deficient in substance, although for some technical reason, as lapse of time or want of jurisdiction in the court, the relief sought for cannot be obtained in that suit. Nicholas v. Murray, 5 Sawy. 320, Fed. Cas. No. 10,223.

[3] Coop. Eq. Pl. 165.

[4] Story, Eq. Pl. (10th Ed.) § 500; Moore v. Lyttle, 4 Johns. Ch. (N. Y.) 183.

nent and valuable rights.[5] In this country, it is believed, the limit of jurisdiction of all courts of equity is now fixed by statute.[6]

Insufficient Statement of Subject-Matter.

What is commonly known as "splitting a cause of action," the opposite fault to that of multifariousness in equity and duplicity at common law, is also objectionable and a ground for demurrer, as a defendant is entitled to have the stated grounds for relief include all that can properly be disposed of in the present suit, since otherwise he might be subjected to protracted and oppressive litigation.[7]

Laches, Statute of Limitations, and Statute of Frauds.

The unreasonable neglect or delay of a complainant to assert his rights by suit, where no statute of limitations is in force, is also a ground of demurrer, where the fact of such laches plainly appears on the face of the bill.[8] This defense is one peculiar to courts of

[5] One of the ordinances of Lord Bacon provided that "all suits under the value of ten pounds are regularly to be dismissed." Beames, Orders Ch. 10, note 33.

[6] See Beach, Mod. Eq. Prac. §§ 11–18. See, also, Story, Eq. Pl. §§ 469–476.

[7] Ante, p. 822; Coop. Eq. Pl. 184, 185; Story, Eq. Pl. (10th Ed.) § 287. See Purefoy v. Purefoy, 1 Vern. 29; Shuttleworth v. Laycock, Id. 245; Margrave v. Le Hooke, 2 Vern. 207; Newland v. Rogers, 3 Barb. Ch. (N. Y.) 432, 435.

[8] Story, Eq. Pl. (10th Ed.) § 485; Horsford v. Gudger, 35 Fed. 388; Naddo v. Bardon, 2 C. C. A. 335, 51 Fed. 493; Olden v. Hubbard, 34 N. J. Eq. 85; Bryan v. Kales, 134 U. S. 126, 10 Sup. Ct. 435; Fogg v. Price, 145 Mass. 513, 14 N. E. 741; Furlong v. Riley, 103 Ill. 628; Denston v. Morris, 2 Edw. Ch. (N. Y.) 37, 46; Le Gendre v. Byrnes, 44 N. J. Eq. 372, 14 Atl. 621; Merrill v. Town of Monticello, 66 Fed. 165; Campau v. Chene, 1 Mich. 400; McLean v. Barton, Har. (Mich.) 279. Where the bill upon its face shows such delay as to amount to laches barring relief, and showing no excuse, it is bad upon its face and subject to demurrer for want of equity. Walker v. Ray, 111 Ill. 315. Followed by Lloyd v. Kirkwood, 112 Ill. 329; Trustees of Schools v. Wright, 12 Ill. 432, so far as contra, overruled. In a proceeding to foreclose a mortgage in chancery, where no excuse is shown in the bill for allowing more than 20 years to elapse before bringing suit, objection to such failure cannot be urged at the hearing upon pleadings and proofs, if the evidence shows that the action is not in fact barred. Baent v. Kenricutt, 57 Mich. 268, 23 N. W. 808. Laches, as an equitable defense, cannot be raised on demurrer. Drake v. Wild, 65 Vt. 611, 27 Atl. 427. In an equitable action against a trustee for an accounting, the question of stale demand cannot be determined on demurrer. Zebley v. Trust Co., 139 N. Y. 461, 34 N. E. 1067. A demurrer to a complaint in equity will not be sustained on the ground that plaintiff's claim is stale, but such ques-

equity, and results from the peculiar nature of equity jurisdiction, which cannot be successfully invoked to relieve a party from the consequences of his gross negligence.[9] Thus, 19 years' acquiescence in a railroad lease was held sufficient to bar a suit to annul it,[10] and a bill to set aside a conveyance after a lapse of 27 years was dismissed on the ground of laches.[11] The defense is available, though no statute of limitations is applicable to the case, but it seems that the facts necessary to sustain it must then be clear and the delay inexcusable.[12] Thus, a bill brought to set aside a deed as obtained by undue influence will not be dismissed by laches, when brought within six years from the date of its record, unless it appears that the complainant, by delay, has deprived the court of the power of ascertaining with reasonable certainty the truth of the matter, or has placed himself in a position of unfair advantage over his adversary.[13]

The statutes of limitations, which fix the time within which actions at law may be brought, are ordinarily followed in equity as to the time within which relief may be sought by a suit; and a demurrer will lie where the lapse of time appears upon the face of the bill, provided the bill does not also show that the statute should not apply.[14] This is true, however, only where the statutory

tion can be determined only on trial of the issues of fact. Town of Mt. Morris v. King, 77 Hun, 18, 28 N. Y. Supp. 281.

[9] Story, Eq. Jur. (12th Ed.) § 64a; Fetter, Eq. pp. 42–44. Sharpe v. King, 3 Ired. Eq. (N. C.) 402.

[10] St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Fed. 440. See, also, Hyde v. Redding, 74 Cal. 493, 16 Pac. 380.

[11] Barton v. Long (N. J. Ch.) 14 Atl. 568.

[12] See Jones v. Slauson, 33 Fed. 632; Le Gendre v. Byrnes, 44 N. J. Eq. 372, 14 Atl. 621.

[13] Le Gendre v. Byrnes, 44 N. J. Eq. 372, 14 Atl. 621.

[14] Wilhelm's Appeal, 79 Pa. St. 120; Board of Sup'rs of Henry Co. v. Winnebago Swamp Drainage Co., 52 Ill. 454. See, also, Reynolds v. Sumner, 126 Ill. 58, 18 N. E. 334; Olden v. Hubbard, 34 N. J. Eq. 85; Van Hook v. Whitlock, 7 Paige (N. Y.) 373; Caldwell v. Montgomery, 8 Ga. 106; Harpending v. Dutch Church, 16 Pet. 455; Underhill v. Insurance Co., 67 Ala. 45; Watson v. Byrd, 53 Miss. 480; Ilett v. Collins, 103 Ill. 74; Hubbard v. Mortgage Co., 14 Ill. App. 40; Bonney v. Stoughton, 18 Ill. App. 562. The statute of limitations may be set up in equity by demurrer; but, when this is done, that particular cause must be assigned in the demurrer. Archer v. Jones, 26 Miss. 583. The

period is thus shown to have elapsed, as the effect of delay for a shorter period raises a mixed question of law and fact, which cannot be decided on demurrer.[15]

Again, where the specific performance of a contract is sought which is within the statute of frauds, and it appears upon the face of the bill that the contract as stated fails to comply with the statute, and there is nothing further alleged to take the case out of its operation, the defendant may claim the benefit of the statute by a demurrer.[16] If, while the fact thus exists, it does not so appear, the objection must be by plea or answer.[17]

Another Suit Pending.

A further ground of demurrer to the substance of the bill is that it appears upon the face of the bill that there is another suit pending between the same parties upon the same facts.[18] This is more often the foundation of a plea than of a demurrer, however, as it is seldom that the fact will be disclosed by the bill, and it will therefore be noticed again as a ground for a plea, the consequences of the fault being the same.[19]

defense of the statute of limitations can be set up by demurrer only when, from the face of the bill, it appears that the bar has attached. When it does not so appear, the defense must be set up by plea or answer (Dickson v. Miller, 11 Smedes & M. 594); and it makes no difference, in such a case, that the bill avers that the debt is due and unpaid (Nevitt v. Bacon, 32 Miss. 212).

[15] See Beekman v. Railway Co., 35 Fed. 3. See cases cited supra, note 8.

[16] See Cozine v. Graham, 2 Paige (N. Y.) 177; Meach v. Stone, 1 D. Chip. (Vt.) 182, 188; Macey v. Childress, 2 Tenn. Ch. 438; Black v. Black, 15 Ga. 445; Van Dyne v. Vreeland, 11 N. J. Eq. 370; Ahrend v. Odiorne, 118 Mass. 261; Cloud v. Greasley, 125 Ill. 313, 17 N. E. 826. The early English cases until Whitbread v. Brockhurst, 1 Brown, Ch. 404, 409, did not recognize the demurrer as a proper method of defense in such cases; but this was afterwards done, and there is no doubt that it is the proper method in this country.

[17] Champlin v. Parish, 11 Paige (N. Y.) 405; Macey v. Childress, 2 Tenn. Ch. 438, 442.

[18] Sears v. Carrier, 4 Allen (Mass.) 339.

[19] See post, c. 7, p. 461.

SAME—DEMURRERS TO DISCOVERY ALONE.

272. Objections that are good grounds for a demurrer to both the relief and the discovery are not good grounds for a demurrer to the discovery alone.

Although, as has been seen, objections that are good grounds for demurrer to both relief and discovery may be assigned as grounds of demurrer to the relief alone, if the defendant thinks fit, and the discovery may be given in an accompanying answer, such objections are not good grounds for a demurrer to the discovery alone.

"It appears to be settled that, upon a bill for discovery and relief, the defendant may answer, and make the discovery sought, and demur to the relief only.[1] And there is also a class of cases in which the defendant may refuse to make a discovery as to particular charges contained in the bill, although a demurrer could not have been sustained as to the relief which the complainant intends to found upon those charges. Those, however, are cases in which the discovery asked for would tend to criminate the defendant, or subject him to a penalty or forfeiture, or would be a breach of confidence which some principle of public policy does not permit, and where the complainant may be entitled to the relief sought, upon the matters charged in the bill, although the defendant is not bound to make a discovery to aid in establishing the facts.[2] But where the same principle upon which the demurrer to the discovery of the truth of certain charges in the complainant's bill is attempted to be sustained is equally applicable as a defense to the relief sought by the bill, the settled rule of the court is that the defendant cannot be permitted to demur as to the discovery only, and answer as to the relief.[3] This general rule is equally applicable to the case of a plea; and the defendant cannot plead any matters in bar

§ 272. [1] Hodgkin v. Longden, 8 Ves. 3; Todd v. Gee, 17 Ves. 273; Welf, Eq. Pl. 133.

[2] Attorney General v. Brown, 1 Swanst. 265, 294; Dummer v. Corporation of Chippenham, 14 Ves. 245; Hare, Disc. 5.

[3] Morgan v. Harris, 2 Brown, Ch. 124; Waring v. Mackreth, Forrest, Rep. 129; Story, Eq. Pl. (10th Ed.) p. 306, note 1; Welf, Eq. Pl. 133.

of the discovery merely, when the matters thus pleaded would be equally valid as a defense to the relief." [4]

273. OBJECTIONS TO PARTICULAR DISCOVERY—Objections to particular discovery, founded upon the nature of the discovery sought, may be taken by demurrer when apparent upon the face of the bill.

274. Objections of this character are:

(a) That the answer required might subject the defendant to penal consequences.

(b) That the discovery sought is not material to the object of the suit.

(c) That it would involve a breach of confidence which it is the policy of the law to preserve inviolate.

(d) That the matter sought to be discovered pertains to the title of the defendant, and not to that of the complainant.

(e) That the right of the defendant is in conscience equal to that of the complainant.

Discovery Involving Penal Liability.

We have already noticed the danger of a criminal liability as a ground for a witness objecting to questions upon the taking of the testimony,[1] and it is also a ground for a defendant's objecting to making discovery.[2] The doctrine anciently established, and still recognized, is that a defendant is protected from answering both questions which might directly subject him to a penalty or forfeiture, as well as those which would or might form a link in the

[4] Brownell v. Curtis, 10 Paige (N. Y.) 210, 213.

§§ 273–274. [1] Ante, p. 140.

[2] Story, Eq. Pl. (10th Ed.) § 595; Paxton v. Douglas, 19 Ves. 225; Stewart v. Drasha, 4 McLean, 563, Fed. Cas. No. 13,424; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; U. S. v. White, 17 Fed. 561, 565. Where one of several defendants demurs to discovery, on the ground that it would subject him to a criminal prosecution, his demurrer should be confined to such parts of the bill as tend to implicate him in the supposed crime. Burpee v. Smith, Walk. (Mich.) 327.

chain by which a criminal liability is to be established; and it is not necessary, to preserve this immunity, that the objectionable result must follow; it is sufficient if it may. The rule thus protects him from answering not only direct questions as to whether he did what was legal or illegal, but also every question tending, as one step, to establish his liability;[3] and it has been carried to the extent of holding that the privilege is one which cannot be waived,[4] and may still be insisted on, though a partial, and already fatal, disclosure has been made.[5] The application of the rule is not free from difficulty, and it is the duty of the complainant to separate legitimate matters from those having this objectionable tendency, as, if the two are confused or connected, the defendant will not be required to make any discovery whatever.[6]

Immateriality of Discovery Sought.

It is a general doctrine of equity that, as the object of the court in compelling a discovery is either to enable itself, or some other court, to decide on matters in dispute between the parties, the discovery sought must be material, either to the relief prayed in the bill, or to some other suit actually instituted or capable of being instituted. If, therefore, the complainant fails to show by his bill such a case as renders the discovery which he seeks material to the relief, if relief is asked for, or does not show a title to sue the defendant in some other court, or that he is actually involved in litigation with the defendant, or is liable to be so, and does not also show that the discovery sought is material to enable him to support or defend a suit, he shows no title to the discovery, and a demurrer will hold.[7] While the term "immateriality" is generally used in its more restricted sense, as synonymous with "irrelevancy," it is here taken in the broader sense of including, not only cases where the evidence, if discovered, would be irrelevant at the con-

[3] Story, Eq. Pl. (10th Ed.) §§ 576, 577; Paxton v. Douglas, 19 Ves. 225; Chauncey v. Tahourden, 2 Atk. 392; Lee v. Read, 5 Beav. 381.

[4] See Lee v. Read, 5 Beav. 381, per Lord Langdale, Ch.

[5] King of the Two Sicilies v. Willcox, 1 Sim. (N. S.) 301.

[6] See Earl of Litchfield v. Bond, 6 Beav. 88.

[7] Story, Eq. Pl. (10th Ed.) §§ 565, 568. See, also, Waring v. Suydam, 4 Edw. Ch. (N. Y.) 426.

templated trial, but also those where it would be of no effect whatever, because there is no proper cause of action.[8]

Breach of Professional Confidence.

Another ground of objecting to discovery by demurrer is that it would, if made, involve a breach of some confidence which it is the policy of the law to preserve inviolate, as confidential communications to an attorney or a physician in his professional capacity,[9] or official secrets or secrets of state,[10] where the facts appear upon the face of the bill. The reason, and the cases in which the privilege is allowed, are the same as in the case of a demurrer to interrogatories on like grounds, and the explanation there given may be referred to.[11]

Where Defendant's Title is Mostly Concerned.

By a general rule of equity, a complainant is only entitled to a discovery of what pertains to, or is necessary to show, his own title, and cannot, by this means, pry into that of his adversary.[12] As summarily stated by a learned writer, the complainant has the right, as a general rule, to exact from the defendant a discovery as to all matters of fact material to the proof of his case, and well pleaded in the bill, which the defendant, by his method of defense, does not admit; but this right is limited to a discovery of such facts as are material to the complainant's case, and does not extend to the manner in which the defendant's case is to be established, nor to the proof necessary to sustain it.[13] Where the bill thus seeks a dis-

[8] Story, Eq. Pl. (10th Ed.) § 564; Hare, Disc. 157, 161; Mitf. Eq. Pl. (by Jeremy) 107, 191, 192.

[9] See Greenough v. Gaskell, 1 Mylne & K. 100; Story, Eq. Pl. (10th Ed.) § 547; ante, p. 140.

[10] See Smith v. East India Co., 1 Phil. Ch. 50; Attorney General v. Corporation of London, 12 Beav. 8; Worthington v. Scribner, 109 Mass. 487; ante, p. 140.

[11] Ante, p. 140.

[12] Lady Shaftsbury v. Arrowsmith, 4 Ves. 67, 71; Adams v. Fisher, 3 Mylne & C. 526; Morris v. Edwards, 23 Q. B. Div. 287; Bolton v. Corporation of Liverpool, 1 Mylne & K. 88. In Massachusetts the English rule has been held inapplicable in Adams v. Porter, 1 Cush. (Mass.) 170. Cf. Haskell v. Haskell, 3 Cush. (Mass.) 540.

[13] Wigram, Disc. (2d Ed.) pp. 15, 116, 261. See, also, Haskell v. Haskell, 3 Cush. (Mass.) 540. Cf. Hardman v. Ellames, 5 Sim. 640, and Adams v. Fisher, 3 Mylne & C. 526.

covery beyond the limits indicated, a demurrer will lie. Thus, where a bill was filed by legatees whose legacies were charged upon real estate, for a discovery and production of a deed by which it was alleged the title of the testator to the real estate was enlarged in the complainant's favor, it was held demurrable on the ground that the deed related to the title of the defendant.[14]

Where the Equities are Equal.

It is also a rule of equity that if a person has, in conscience, a right equal to that of a person filing a bill against him, though not clothed with the perfect legal title, it is improper for a court of equity to compel any discovery from the former which may endanger his title; and, if such a case clearly appears upon the face of the bill, a demurrer will hold.[15] The most obvious case of this character is that of a bona fide purchaser for valuable consideration, without notice of the complainant's claim;[16] but even here, if the complainant founds his bill upon a legal title, seeking to support it by discovery, and the defendant relies solely on an equitable title to protect himself, a purchaser thus claiming must be not only bona fide, for valuable consideration and without notice, but he must have paid the purchase money, or some part of it.[17]

DEMURRERS TO ORIGINAL BILLS NOT FOR RELIEF.

275. Demurrers may be taken to original bills not praying relief, such as bills to take testimony de bene esse, bills to perpetuate testimony, and bills strictly for discovery, whenever, under the principles already considered, formal or substantial requisites for the presentment of a case for the special object are wanting, and the defect is apparent upon the face of the bill.

[14] Wilson v. Forster, Younge, 280. See, also, Kimberly v. Sells, 3 Johns. Ch. (N. Y.) 467.

[15] Story, Eq. Pl. (10th Ed.) §§ 603, 604.

[16] 1 Daniell, Ch. Pl. & Prac. (5th Ed.) 569; Jerrard v. Saunders, 2 Ves. Jr. 454; Langd. Eq. Pl. § 188.

[17] Boone v. Chiles, 10 Pet. 177, 210.

DEMURRERS TO BILLS NOT ORIGINAL.

276. Demurrers to bills not original may generally be taken for defects in substance or form, as in the case of the same method of defense to original bills, and also for such other material defects as show that the party filing such bill is not, upon its face, entitled to the particular relief he seeks.

Demurrers to the different kinds of bills not original may often be presented upon many of the grounds upon which original bills are objectionable, but the peculiar form and special object of the first render them open also to special objections, which we shall briefly notice, and which will be more fully understood by a comparison with the essential requisites of such bills as elsewhere given.[1]

Supplemental Bills and Bills of the Same Nature.

The objections for which a demurrer may be taken to either of the above forms of bill are, briefly, (1) that the complainant has no right to file that species of bill, either from want of title or from mistake in pleading;[2] (2) that the new matter relied upon arose prior to the filing of the original bill, and should therefore have been included therein or made the subject of an amendment;[3] and (3) that the new bill seeks to make a new and different case from that originally presented.[4]

Bills of Revivor and Bills of the Same Nature.

Demurrers to bills of the above character are generally sustained for (1) want of privity between the parties to the same;[5] or (2)

§§ 275–276. [1] Ante, c. 4, pp. 289–302.

[2] Coop. Eq. Pl. 212, 213; Story, Eq. Pl. (10th Ed.) §§ 612, 613.

[3] Story, Eq. Pl. (10th Ed.) §§ 614, 615. See, also, Usborne v. Baker, 2 Madd. 387; Baldwin v. Mackown, 3 Atk. 817; Stafford v. Howlett, 1 Paige (N. Y.) 200.

[4] See Colclough v. Evans, 4 Sim. 76; Dias v. Merle, 4 Paige (N. Y.) 259; Story, Eq. Pl. (10th Ed.) § 616. And see ante, p. 290 et seq., as to the requisites of supplemental bills.

[5] Story, Eq. Pl. (10th Ed.) § 618. See, also, Nanney v. Totty, 11 Price, 117; Harris v. Pollard, 3 P. Wms. 348.

want of interest in the party seeking to revive the suit;[6] or (3) imperfections in the frame of the bill itself.[7]

Cross Bills.

While cross bills are similar in their nature to original bills, and though any ground of demurrer to which they are open would be available against original bills, the converse of the proposition is not generally true. For example, a demurrer for want of equity will not lie to a cross bill filed by a defendant for the reason that he is entitled to depend upon the jurisdiction conferred by the allegations of the original bill, the cross bill being generally treated as a method of defense.[8] The grounds of demurrer to cross bills, briefly stated, are generally: (1) That it fails to seek equitable relief,—that is, relief within the limits of a proper defense to the original bill;[9] (2) that it does not show a title to such relief in the party filing it;[10] or (3) that it is contrary to the established practice of the court.[11]

Bills of Review and Bills of the Same Nature.

The grounds of demurrer to a bill of review, as generally accepted, seem to be: (1) That the bill is erroneous or defective in its recitals of the proceedings and decree sought to be reviewed;[12] (2) that it is not brought within the time allowed;[13] possibly, (3) if founded upon new matter, that such matter is irrelevant,[14] though the latter ground would ordinarily be disposed of by the court

[6] Story, Eq. Pl. (10th Ed.) § 620.

[7] Fallowes v. Williamson, 11 Ves. 306. And see ante, p. 297 et seq., as to the requisites of bills of revivor.

[8] Story, Eq. Pl. (10th Ed.) § 628; Doble v. Potman, Hardr. 160; Burgess v. Wheate, 1 W. Bl. 123, 132.

[9] Coop. Eq. Pl. 86, 215; Calverley v. Williams, 1 Ves. Jr. 213. A cross bill may not, it has been held, be maintained in all cases, even for equitable relief. Hilton v. Barrow, 1 Ves. Jr. 284.

[10] Mason v. Gardiner, 4 Brown, Ch. 436; Benfield v. Solomons, 9 Ves. 84.

[11] See White v. Buloid, 2 Paige (N. Y.) 164; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150; Berkley v. Ryder, 2 Ves. Sr. 533. And see ante, p. 303 et seq., as to the requisites of cross bills.

[12] Story, Eq. Pl. (10th Ed.) § 634a; Whiting v. Bank, 13 Pet. 6.

[13] Story, Eq. Pl. (10th Ed.) 635.

[14] Coop. Eq. Pl. 216.

on consideration as to whether leave to file the bill should be granted;[15] or (4) that the bill does not conform to the established practice of the court.[16] A bill in the nature of a bill of review does not seem to be open to any special cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill.[17]

Bills to Impeach Decrees for Fraud.

Demurrers to bills of this class will lie, generally, where the circumstances therein stated as grounds for impeaching the decree in question do not amount to a fraud; or where, though a defect of parties to the suit whose rights are affected by the decree is alleged as existing in the original suit, the fact also appears that sufficient parties were before the court to bind all who were interested.[18]

Bills to Suspend or Avoid Decrees.

As bills of this class are rare, and their use must depend upon special circumstances, it seems impracticable to state any general rules as to demurrers beyond referring to those applicable to bills of all classes.[19]

Bills to Enforce Decrees.

A few peculiar grounds of demurrer are available against bills of this class, in addition to defects objectionable under the rules of general application, as where it appears upon the face of the bill that the complainant has no right to the benefit of the decree, and thus no title to sue, or where necessary parties, whose rights and interests would be injuriously affected, have not been brought before the court.[20]

[15] See ante, p. 315.
[16] Read v. Hambey, 1 Ch. Cas. 44.
[17] Story, Eq. Pl. (10th Ed.) § 637.
[18] Coop. Eq. Pl. 217, 218.
[19] See ante, p. 317, as to the requisites of bills of this class.
[20] Coop. Eq. Pl. 99; Hamilton v. Houghton, 2 Bligh, 169.

CHAPTER VII.

THE PLEA.

277-280. Definition, Nature, and Office of Pleas.
281-283. Admission Made by a Plea.
284-290. Effect of Decision on Argument of Plea.
291. Form of Pleas.
292. Pure Pleas.
293. Negative Pleas.
294. Anomalous Pleas.
295-299. Answers in Support of Pleas.
300. Pure Pleas.
301. Negative Pleas.
302. Anomalous Pleas.
303. Pleas Overruled by Answer.
304. Answers in Subsidium.
305. Grounds of Pleas.
306. Pleas to Original Bills for Relief.
307. Pleas to Both Relief and Discovery.
308-309. Pleas to Relief Alone.
310. Pleas to the Jurisdiction.
311. Pleas to the Person.
312. Of Plaintiff.
313. Of Defendant.
314. Pleas to the Bill.
315-317. Pleas in Bar.
318. Bar Created by Statute.
319-320. Bar Created by Matter of Record.
321. Bar Created by Matter in Pais.
322. Pleas to Discovery Alone.
323. Objections to Particular Discovery.
324-325. Pleas to Original Bills not for Relief.
326-328. Pleas to Bills of Discovery.
329. Pleas to Bills not Original.

DEFINITION, NATURE, AND OFFICE OF PLEAS.

277. A plea in equity is a method of defense, sometimes called a special answer, to the whole or some distinct indicated part of the complainant's bill, showing or relying upon a fact or facts, not apparent up-

on the face of the bill, and constituting a single point of defense, as cause why the particular suit, or that part to which the plea is directed, should be dismissed, delayed, or barred.

278. The object of a plea is to avoid the necessity of making a full answer, and the delay and expense of a hearing on the merits, by disposing of the bill, or some distinct part of it, upon the trial of a single preliminary question upon which the whole bill, or the part opposed by the plea, depends.

279. A plea may be to the whole or to any distinct part of the bill, and, if to a part only, the remaining parts must be met by demurrer, plea, or answer. In such case each must relate to a distinct part, for, if there is any overlapping, the demurrer may be overruled by the plea, and both by the answer.

280. A plea must not contain more than one defense, or it will be open to objection for duplicity, nor deny more than one material allegation of the bill, or it will be multifarious; but a variety of facts and circumstances may be included in one plea if all conduce to establish a single point of defense, and the court may, in its discretion, to prevent hardship, permit several pleas, presenting distinct defenses, to be filed to the same bill.

As has been seen, a demurrer is the proper mode of defense to a bill, when any objection is apparent upon the face of the bill itself, either from matter contained in it, or from defects in its frame, or in the case made by it. When an objection to the bill is not apparent from the bill itself, if the defendant means to take advantage of it, he must show to the court the matter which creates the objection either by answer or by plea. Answers in equity form the subject-matter of the succeeding chapter.

Definition.

A "plea" has been usually defined as a special answer showing or relying upon one or more things as a cause why the suit should

be either dismissed, delayed, or barred.[1] Lord Redesdale defines a "plea" as "a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer which the bill required."[2] Heard says: "A plea is nothing more than a special answer to the bill, setting forth and relying upon some one fact, or a number of facts, tending to one point, sufficient to bar, delay, or dismiss the suit;"[3] and in another place: "A plea is, in effect, a short answer averring some fact or instrument, or statute which meets and destroys the whole substance of the plaintiff's equity."[4] It is a little misleading, however, to speak of a plea as being an "answer," for it is not the office of a plea to give any discovery.[5] Indeed, a plea is in truth an excuse for not answering. However, it is the office of an answer to set up defenses as well as to give discovery, and it is also the office of a plea to set up a defense. In this sense of the term, therefore, a "plea" may be said to be a "special answer."

Pleas and Answers Distinguished.

The double nature of a bill in equity has already been noticed. It states an equitable cause of action, and calls upon defendant for a discovery to prove the case alleged. The answer, as will be seen, likewise consists of two elements,—it states defendant's defense, and gives the required discovery. A plea, on the contrary, is single in its nature. Its sole function is to state a defense. Where discovery is required, it is given in a supporting answer. In an answer the plea (defense) and evidence are combined. In a plea supported by answer, the discovery and defense are seen distinguished. "The answer is here no part of the defense. It is nothing more than the plaintiff has a right to require as evidence for the purpose of trying the validity and truth of the plea."[6]

§§ 277–280. [1] Story, Eq. Pl. 649; Bart. Suit in Eq. 106; Wig. Disc. § 98; Armitage v. Wadsworth, 1 Madd. 189. A plea is a special answer, and the defendant may therefore put in a plea to the bill under the usual order for further time to answer. Heartt v. Corning, 3 Paige (N. Y.) 566.

[2] Roche v. Morgell, 2 Schoales & L. 721, 725.

[3] Heard, Eq. Pl. p. 91.

[4] Id. p. 88.

[5] Langd. Eq. Pl. § 92, note 1.

[6] Hare, Disc. p. 25.

Pleas and Demurrers Distinguished.

The distinction between a demurrer and a plea dates as far back as the time of Lord Bacon, by the fifty-eighth of whose ordinances for the administration of justice in chancery "a demurrer is properly upon matter defective contained in the bill itself, and no foreign matter; but a plea is of foreign matter, to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like." [7] Lord Redesdale, in his treatise on Pleadings, says: "A plea must aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, rest on facts in the bill." [8] And Mr. Jeremy, in a note to this passage, commenting on the ordinance of Lord Bacon, observes: "The prominent distinction between a plea and a demurrer here noticed is strictly true, even of that description of plea which is termed negative; for it is the affirmative of the proposition which is stated in the bill." In other words, a plea which avers that a certain fact is not as the bill affirms it to be sets up matter not contained in the bill. That an objection to the equity of the plaintiff's claim as stated in the bill must be taken by demurrer, and not by plea, is so well established that it has been constantly assumed, and therefore seldom stated in judicial opinions; yet there are instances in which it has been explicitly recognized by courts of chancery.[9] Averments of pure matters of law arising upon the plaintiff's case as stated in the bill, and affecting the equity of the bill, are a proper subject of demurrer, and cannot be availed of by way of plea.[10] "A plea in equity is, in effect, an introduction by the defendant of

[7] Beames, Orders Ch. 26.

[8] Mitf. Eq. Pl. 297.

[9] Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 540; Billing v. Flight, 1 Madd. 230; Rhode Island v. Massachusetts, 14 Pet. 210, 258.

[10] Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534. A plea is bad which sets up matters of fact appearing on the face of the bill, and which sets up affirmatively, by way of defense, a fact which a plaintiff is required to allege in his bill by rule 94 in equity. Garrett v. Terminal Co., 29 Fed. 129. While a defendant cannot plead merely the facts averred in the bill of complaint, but must present his objections to their sufficiency by demurrer, yet he may present a good plea by averring, along with the facts contained in the bill, other and additional facts, provided that both together establish a defense to the bill. Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 50 Fed. 151.

fresh facts into the case made out by the plaintiff, sufficient, if proved, to make the action demurrable." [11]

Demurrers and pleas were both borrowed from the common law,[12] and have several points of resemblance and contrast. The ultimate object of both is to avoid giving a full answer, that is, of setting up a defense to the merits and giving such discovery as required, by answer, and also the expense and delay of preparing for a hearing on the merits. They both seek to dispose of the whole case or some distinct part of it by the determination of some preliminary question upon which the whole bill or the part opposed by the demurrer or plea depends. A demurrer raises a question of law,—does the bill state an equitable cause of action? A plea, also, before allowance by the court or acceptance by the complainant, raises a question of law,—does the plea state a good defense, if true? "Upon the argument of a plea, the question is whether it shall be allowed or overruled, just as upon the argument of the demurrer the question is whether the demurrer should be allowed or overruled. But a demurrer is allowed only when the bill is bad upon its face, assuming it to be true in fact, while a plea is allowed when, and only when, the plea is good upon its face, assuming it to be true in fact." [13] "Upon the allowance of either, the plaintiff may obtain leave to amend in the discretion of the court and upon terms. Upon the overruling of demurrer or plea, the defendant is required to answer the bill, or the part unanswered, and in default thereof, or if the demurrer or plea be found frivolous and interposed for vexation or delay, a decree may be taken pro confesso." [14] Upon argument a demurrer admits the truth of all facts well pleaded in the bill. "Upon argument of a plea, every fact stated in the bill, and not denied by answer in support of the plea, must be taken for true." [15] Like demurrers, pleas are available as a method of defense only to the bill, and when allowed, upon argument, or when the complainant, accepting a plea as sufficient in form and substance, files a replication denying the truth of the defense asserted, an issue of fact is raised, upon the

[11] Heard, Eq. Pl. 84.

[12] Langd. Eq. Pl. (2d Ed.) § 92.

[13] Langd. Eq. Pl. § 98, note 1.

[14] Phelps, Jud. Eq. § 60.

[15] Roche v. Morgell, 2 Schoales & L. 721, 727; Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 540. See, also, post, p. 422.

determination of which the further progress of the suit must depend.[16]

Office of Plea.

The proper office of a plea in equity is not, like an answer, to meet all the allegations of the bill, nor, like a demurrer, admitting those allegations, to deny the equity of the bill, but it is to present some distinct fact which of itself either abates, or suspends, or creates a bar to the suit, or to the part to which the plea applies, and thus avoid the necessity of interposing a defense to the merits, as well as of making the discovery asked for and the expense of going into the evidence at large.[17] "The office of a plea generally is, not to deny the equity, but to bring forward a fact which, if true, displaces it; not a single averment, * * * but perhaps a series of circumstances forming in their combined result some one fact which displaces the equity." [18]

The fact brought forward to displace the equity may consist of new matter not contained in the bill, such as a release or a settled account.[19] In such a case the plea is called an "affirmative" or "pure" plea. But a plea may also consist of the denial of some essential allegation of the bill, such as a denial of the allegation of partnership in a bill for a partnership accounting. Such a plea is called a "negative plea." There is another form of plea called an "anomalous plea." These several kinds of pleas will be presently separately considered.

[16] The term "bill," as used in the text, covers every species of bill in equity, including cross bills, as any defect in the particular form or substance required may be a matter of defense. See Mitf. Eq. Pl. (Jeremy's Ed.) 106, 107.

[17] Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534. See, also, Loud v. Sergeant, 1 Edw. Ch. 164; Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374; McCloskey v. Barr, 38 Fed. 165; U. S. v. American Bell Tel. Co., 30 Fed. 523; Spangler v. Spangler, 19 Ill. App. 28.

[18] Rowe v. Teed, 15 Ves. 377, per Lord Eldon. See, also, Union B. R. Co. v. East Tennessee & G. R. Co., 14 Ga. 327; Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534. And see Bailey v. Leroy, 2 Edw. Ch. (N. Y.) 514; Black v. Black, 15 Ga. 445. The matters set up in the plea must be a complete bar to the equity of the bill. Platt v. Oliver, 1 McLean, 295, Fed. Cas. No. 11,114; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178.

[19] Story, Eq. Pl. § 651.

Extent of Plea.

Just as in the case of demurrers, a plea may be used to raise an objection either to the whole bill or to any distinct part of it.[20] But the whole bill must be met in some manner. A defendant may plead different matters to separate parts of the same bill in the same manner that he may demur to different portions of the bill.[21] "Suppose that a testator had bequeathed to A. B. a sum of stock, a pecuniary legacy, and a specific chattel; and that the legatee had filed a bill against the executor for a transfer of the stock, for payment of the money, and for delivery of the chattel. It would have been competent to the executor to plead three things: First, a transfer of the stock; second, a release of the pecuniary legacy; and, third, that the chattel had been destroyed by fire." [22] A defendant may in like manner plead and demur, or plead and answer, to different parts of the same bill.[23] The extent of the plea—that is, whether it goes to the whole bill or only to a part of the bill—must be distinctly set forth; and, where it is to a part, it must distinctly specify what part.[24] Where a defendant puts in several pleas to the same bill, he must point out to what particular part of the bill each plea is applicable.[25] A plea to such parts of the bill as are not answered must be overruled as too general.[26] "So, if the parts of the bill to which the plea extends are not clearly and precisely expressed, as if the plea is general, with an exception of matters after mentioned, and is accompanied by an answer, the plea is bad; for the court cannot judge what the plea covers, without looking into the answer, and determining whether it is sufficient or not before the validity of the plea can be considered.[27] But, if the plea excepts clearly and definitely certain portions of the property, respecting which the suit is brought, as, for example, cer-

[20] Eq. Rule 32; Beard v. Bowler, 2 Bond, 13, Fed. Cas. No. 1,180.

[21] Daniell, Ch. Pl. & Prac. 611.

[22] Emmott v. Mitchell, 14 Sim. 432, 434.

[23] Daniell, Ch. Pl. & Prac. 611.

[24] Bart. Suit in Eq. 107. See Jarvis v. Palmer, 11 Paige (N. Y.) 650; Leacraft v. Demprey, 4 Paige (N. Y.) 124; Van Hook v. Whitlock, 3 Paige (N. Y.) 409, 417.

[25] Daniell, Ch. Pl. & Prac. 611.

[26] Story, Eq. Pl. § 659.

[27] Salkeld v. Science, 2 Ves. Sr. 107; Howe v. Duppa, 1 Ves. & B. 511.

tain real estate, describing it, so that no reference to any other parts of the record is necessary to make it intelligible, it is not open to the objection, although it is stated in the plea by words of exception." [28]

Same—Pleas Bad in Part.

"But, although the general rule is that, in the case of a partial plea, a defendant must specify distinctly what part of the bill he pleads to, the rule which has been stated, as applicable to a demurrer, namely, that it cannot be good in part and bad in part, is not applicable with the same strictness to a plea; for it has been repeatedly decided that a plea in equity may be bad in part, and not in the whole, and the court will allow it to so much of the bill as it is properly applicable to.[29] The rule that a plea may be allowed in part only is to be understood with reference to its extent,—that is, to the quantity of the bill covered by it, and not to the ground of defense offered by it,—and, if any part of the defense made by the plea is bad, the whole must be overruled." [30]

Same—Plea Overruled by Answer.

Where different defenses are set up to a bill, some by way of plea and others by demurrer or answer, each must relate to a different, distinct part of the bill. It has already been seen that if a demurrer and plea, or demurrer and answer, are filed to the same part of a bill, the demurrer will be overruled by the plea or answer. In the same manner, if a plea and answer are filed to the same part of the bill, the answer will overrule the plea,[31] as a defendant who submits to answer must, in general, answer fully. The overruling of pleas by answers will be considered more in de-

[28] Story, Eq. Pl. § 659.

[29] Story, Eq. Pl. §§ 692, 693; Huggins v. York Buildings Co., 2 Atk. 44; Kirkpatrick v. White, 4 Wash. C. C. 595, Fed. Cas. No. 7,850; Bell v. Woodward, 42 N. H. 181, 193; French v. Shotwell, 20 Johns. (N. Y.) 668; Wythe v. Palmer, 3 Sawy. 412, Fed. Cas. No. 18,120.

[30] Daniell, Ch. Pl. & Prac. p. 611.

[31] Daniell, Ch. Pl. & Prac. p. 611, citing, inter alia, Searight v. Payne, 1 Tenn. Ch. 186; Madison, W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co., 5 Wis. 173; Salmon v. Dean, 3 Macn. & G. 344, 348; Clark v. Saginaw City Bank, Har. (Mich.) 240. Where a demurrer or plea and answer is to the same matter, defendant may be compelled to elect by which he will abide. Hayes v. Dayton, 18 Blatchf. 420, 8 Fed. 702.

tail hereafter, in connection with the discussion as to the extent to which pleas must be supported by answer.[32] If two pleas are filed to the same part of a bill, they are objectionable on the ground of duplicity, for the fundamental principle of the plea is that it reduces the cause, or some distinct part of it, to a single point.[33]

Double Pleas.

It is a fundamental principle governing pleas of all kinds that the matter pleaded must reduce the issue between the plaintiff and the defendant to a single point. If a plea is double,—that is, tenders more than one defense as a result of the facts stated,—it is objectionable.[34] "A plea, in order to be good, whether it be affirmative or negative, must be either an allegation or a denial of some leading fact, or of matters which, taken collectively, make out some general fact, which is a complete defense. But although a defense offered by way of plea should consist of a great variety of circumstances, yet, if they all tend to a single point, the plea may be good.[35] Thus, a plea of title, derived from the person under whom the plaintiff claims, may be a good plea, although consisting of a great variety of circumstances; for the title is a single point, to which the cause is reduced by the plea.[36] So, a plea of conveyance, fine, and nonclaim would be good, as amounting to but one title."[37] Upon this account it is a general rule that a plea ought not to contain more defenses than one, and that a double plea is informal and multifarious, and therefore improper;[38] for, if two matters

[32] See post, p. 488.

[33] Story, Eq. Pl. § 657, and note.

[34] Daniell, Ch. Pl. & Prac. 607; Moreton v. Harrison, 1 Bland (Md.) 491, 496; Van Hook v. Whitlock, 3 Paige (N. Y.) 409; Goodrich v. Pendleton, 3 Johns. Ch. (N. Y.) 384, 387; Rhode Island v. Massachusetts, 14 Pet. 210, 259; Whitebread v. Brockhurst, 1 Brown, Ch. 404, 416; Albany City Bank v. Dorr, Walk. (Mich.) 317; Carroll v. Potter, Id. 355; Giant-Powder Co. v. Safety Nitro-Powder Co., 19 Fed. 509; McCloskey v. Barr, 38 Fed. 165. A plea to the jurisdiction which sets up matters affecting the validity of the service, matters showing want of proper citizenship, and also the pendency of a prior suit, is bad for duplicity. Briggs v. Stroud, 58 Fed. 717.

[35] Story, Eq. Pl. § 652; Saltus v. Tobias, 7 Johns. Ch. (N. Y.) 214.

[36] Whitebread v. Brockhurst, 1 Brown, Ch. 416, note 9.

[37] Story, Eq. Pl. § 652.

[38] Rhode Island v. Massachusetts, 14 Pet. 210, 259; Gaines v. Mausseaux, 1 Woods, 118, Fed. Cas. No. 5,176; Giant-Powder Co. v. Safety Nitro-Powder Co., 19 Fed. 509; McCloskey v. Barr, 38 Fed. 165; Sharon v. Hill, 22 Fed.

of defense may be thus offered, the same reason will justify the making of any number of defenses in the same way, by which the ends intended by a plea would not be obtained; and the court would be compelled to give instant judgment upon a variety of defenses, with all their circumstances, as alleged by the plea, before they are made out in proof, and consequently would decide upon a complicated case, which might not exist.[39] Therefore, where, to a bill praying a conveyance of four estates, the defendant put in a plea of a fine as to one estate, and in the same plea he put in a disclaimer as to the other estates, the plea was overruled; for the disclaimer was wholly disconnected with the plea of the fine, and the plea was therefore double.[40] It may then be laid down as a rule that various facts can never be pleaded in one plea, unless they are all conducive to a single point, on which the defendant means to rest his defense; for otherwise it will be open to the charge of duplicity or multifariousness.[41] The objection is still stronger where two facts are pleaded which are inconsistent with each other.[42]

The reasoning, as to duplicity in a plea, does not, perhaps, in its full extent, apply with equal force to the case of two several bars pleaded as several pleas, although to the same matter; and it may be said that such pleading is admitted at law, and ought, therefore, to be equally so in equity. But as a plea is not the only mode of defense in equity there is not the same necessity as at law for admitting this kind of pleading.[43] But although the ordinary course of practice in courts of equity does not admit of several pleas, yet, where great inconvenience might otherwise be sustained in a particular case, the court will sometimes, in its discretion, allow sev-

28; Didier v. Davison, 10 Paige (N. Y.) 515; Benson v. Jones, 1 Tenn. Ch. 498; Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374. Where plaintiff replies to the plea instead of setting it down for argument, the objection of duplicity is waived. Sharon v. Hill, 22 Fed. 28.

[39] Story, Eq. Pl. § 653, and note.

[40] Watkins v. Stone, 2 Sim. 49.

[41] Story, Eq. Pl. § 654.

[42] Story, Eq. Pl. § 656; Emmott v. Mitchell, 14 Sim. 432.

[43] Saltus v. Tobias, 7 Johns. Ch. (N. Y.) 214; Didier v. Davison, 10 Paige (N. Y.) 515; Kay v. Marshall, 1 Keen, 190.

eral pleas.[44] Thus, for example, a plea that the plaintiff is not heir, as asserted in his bill, and a plea of the statute of limitations, have been allowed to be pleaded together.[45]

But express leave of court must be had before two pleas can be set up,[46] and a special case of hardship must be made out before leave will be granted.[47] Where a double or multifarious plea is replied to without objection, the informality is waived.[48] Where a defendant has filed several pleas without leave of court, he will be put to his election as to which he will stand upon,[49] or the pleas may be set down as an answer.[50]

Same—Multifariousness in the Plea.

What is classed by Prof. Langdell as multifariousness in the plea is where a negative plea, or the negative part of an anomalous plea, denies more than one essential fact or allegation of the bill. The same authority further states that, "in applying this rule, no reliance can be placed upon the language of the bill; for it may state evidence instead of facts. The defendant, therefore, must inquire what are the issuable facts which constitute the equity of the bill or the matter of the anticipatory replication; and then, having

[44] Didier v. Davison, 10 Paige (N. Y.) 515; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726; Gibson v. Whithead, 4 Madd. 241; Saltus v. Tobias, 7 Johns. Ch. 214; Kay v. Marshall, 1 Keen, 190.

[45] Bampton v. Birchall, 4 Beav. 558.

[46] Sharon v. Hill, 22 Fed. 28. Leave will be granted only upon special application and notice. Didier v. Davison, 10 Paige (N. Y.) 515; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726. Defendant will ordinarily be required to pay the costs. Kay v. Marshall, 1 Keen, 190; Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374.

[47] 1 Beach, Mod. Eq. Prac. § 297; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726.

[48] Sharon v. Hill, 22 Fed. 28.

[49] Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374. See, also, Reissner v. Anness, 3 Ban. & A. 148. A plea should rest the defense on a single point; but, though it should be multifarious, yet, if it discloses facts which form a fatal objection to the bill, as the names of necessary parties, it will be suffered to stand, with liberty to the plaintiff to amend his bill, by adding the parties, on payment of the costs of the plea and subsequent proceedings, but not the useless matter in the plea. Cook v. Mancius, 3 Johns. Ch. (N. Y.) 427.

[50] Noyes v. Willard, 1 Woods, 187, Fed. Cas No. 10,374.

decided which of these facts he will deny (if there be more than one), he must frame his plea accordingly." [81]

Form of Plea.

The following may be given as the form of a negative plea:

TITLE OF CAUSE.

Circuit Court of the United States. District of Minnesota. Third Division.

A. B.,
Complainant,
vs.
C. D.,
Defendant.

TITLE OF PLEA.

The plea of C. D., the above-named defendant, to the bill of complaint of A. B., the above-named complainant:

INTRODUCTION.

The above-named defendant, by protestation, not confessing or acknowledging all or any part of the matters and things in said bill of complaint contained to be true in manner and form as therein set forth, does plead thereto, and for cause of plea saith:

BODY.

That this defendant is not the administrator of the estate of John Smith, as in said bill set forth and alleged, and that the administrator of said estate is in fact one James Brown, who should be made a party to this suit, as this defendant is advised and informed; all which matters and things this defendant avers to be true, and pleads the same to the said bill of complaint,

PRAYER.

And humbly prays the judgment of this honorable court whether he shall or ought to be compelled to make any further or other answer to the said bill of complaint.

E. F., Solicitor and of Counsel for Defendant.

CERTIFICATE OF COUNSEL.

I hereby certify that the above and foregoing plea is, in my opinion, well founded in point of law.

E. F., Solicitor for Defendant.

[81] Langd. Eq. Pl. § 108.

VERIFICATION.

State of Minnesota, }
} ss.
County of Ramsey. }

C. D., being duly sworn, deposes and says that he is the defendant above named, and that the above and foregoing plea is true in point of fact, and is not interposed for delay. C. D.

Subscribed and sworn to before me this 1st day of October, 1895.
X. Y., Notary Public, Ramsey County, Minn.

The following may instance a plea of another suit pending; that is, a plea in bar:

[Title and commencement as before.]

This defendant, by protestation, not confessing or acknowledging all or any part of the matters and things in said bill of complaint set forth to be true in manner and form as therein alleged, does plead thereto, and for cause of plea saith: That heretofore, and before said complainant exhibited his present bill in this honorable court, to wit, on the 9th day of May, 1895, the said complainant did exhibit his bill of complaint in this honorable court, against this defendant, for the same matters, and to the same effect, and for the like relief, as the said complainant does by his present bill demand and set forth; to which said first bill this defendant did duly make and file his answer, and to which said answer the said complainant did reply, and that thereupon other proceedings were had; and that the said former bill is still depending in this court, and the matters thereof are still undetermined,—all which matters and things this defendant avers to be true, and this defendant doth plead the said former bill, answer, and proceedings in bar to the present bill of said complainant, and humbly prays the judgment of this honorable court whether he shall or ought to be compelled to make any other or further answer to the said bill.

[Signature of counsel, certificate, and oath.]

Frame of the Plea.

As will be seen from the foregoing examples, a plea, like a demurrer, is always prefaced by a protestation against any confession or admission of the facts stated in the bill, though the only use of this seems to be to prevent the defendant from being concluded in another suit by the admission made for the purpose of determining the validity of the plea.[52] After the protestation the plea

[52] Story, Eq. Pl. § 694; Beames, Pl. Eq. 46, 47.

should show the extent to which it goes, as to the whole or a part of the bill, and, if the latter, to what part.[53]

Following these comes the substance or matter relied on as a defense, such as an objection to the jurisdiction, or to the person of either complainant or defendant, or in bar of the suit, together with such averments as are necessary to support it. This is the most important part of the plea, and its requisites in the various kinds of pleas will be hereafter noticed. In any case, the averments must fully support the plea in its presentment of the defense proposed.[54]

After the substance or body of the plea comes the conclusion, which is a repetition that the defense offered is relied upon for the particular object already stated, as, for instance, in bar of the suit, and containing also the prayer of the defendant for the judgment of the court as to whether he shall or ought to be compelled to make any further or other answer to the bill, or to that part to which the plea is directed.[55]

The plea is signed by counsel, and must, in the federal courts at least, be supported by a certificate of counsel that, in his opinion, it is well founded in point of law.[56] It must also, if it pleads in bar matter in pais, be sworn to by the defendant; but the general rule of equity pleading does not require this when the defense is an objection to the jurisdiction, or to the person of the complainant, or a plea in bar of matter of record.[57]

[53] Beames, Pl. Eq. 46, 47; Story, Eq. Pl. § 659. See Salkeld v. Science, 2 Ves. Sr. 107; Howe v. Duppa, 1 Ves. & B. 511, 514.

[54] In equity, the same strictness is required in pleading as to matter of substance as at law; and all the facts necessary to make a plea a complete bar to the case made by the bill, so far as the plea extends, so that the plaintiff may take issue upon it, must be clearly and distinctly averred. Danels v. Taggart's Adm'r, 1 Gill & J. (Md.) 311. See, also, Burdett v. Grew, 8 Pick. (Mass.) 108.

[55] Story, Eq. Pl. § 694, and note. When the defendant to a bill for foreclosure of mortgage interposes a plea to such bill, but fails to verify it by oath, and fails to have it certified by his counsel as being, in his opinion, well founded in law, the complainant has the right to ignore it, and enter decree pro confesso, for want of any pleading. Trower v. Bernard (Fla.) 20 South. 241.

[56] Eq. Rule 31. Under this rule, no demurrer or plea can be filed without this certificate.

[57] Story, Eq. Pl. § 696. Eq. Rule 31 provides that no demurrer or plea shall be filed unless supported by an affidavit of the defendant that it is true

Form of Plea and Answer.

The following may be used to illustrate the form of a plea and answer:

[Title of cause.]

After the substance or body of the plea and the repetition of the object of the defense pleaded:

And this defendant, not waiving his said plea, but wholly relying and insisting thereon, and in aid and support thereof, for answer to the residue of the complainant's bill not hereinbefore pleaded unto, or so much thereof as he, this defendant, is advised is in any case material or necessary for him to make answer unto, answers and says: [Here insert substance of answer and the formal prayer.]

ADMISSIONS MADE BY A PLEA.

281. A plea constructively admits the truth of all material facts well pleaded in the bill, or in such part of the bill as it opposes, so far as they are not controverted by the plea.

282. This admission is not available against the defendant if the plea is overruled; but if the plea is allowed, or if the complainant takes issue upon it, thereby admitting its sufficiency, the admission is conclusive, and, if the plea is proved false in fact, the complainant is entitled to such a decree as the allegations of the bill will justify.

283. So far as complainant's case is admitted, he has no need of a discovery, and to that extent a plea relieves defendant of the necessity of making any discovery.

Every plea presents a double question: First, its sufficiency in law as a defense; and, second, its truth in point of fact. If either question is determined adversely to defendant, his plea will afford him no protection. If the complainant doubts the sufficiency of the

in point of fact and is not interposed for delay. See, under this rule, National Bank v. Insurance Co., 104 U. S. 54; Secor v. Singleton, 3 McCrary, 230, 9 Fed. 809; Filer v. Levy, 17 Fed. 609, 610.

plea in point of law, he can have it set down for argument.[1] If, upon the argument, the plea is adjudged good in point of law, the complainant may still take issue upon its truth in fact by filing a rep-

§§ 281–283. [1] The only method by which complainant may test the sufficiency of a plea, or, if its sufficiency be conceded, the truth of its averments, is that provided by Eq. Rule 33, and consists either in setting down the plea to be argued or in taking issue upon it as to the facts; and where a plea in bar is supported by answer, as provided by Eq. Rule 32, complainant cannot properly except to the answer for insufficiency, and at the same time move to quash the plea; and, if he does so, it must be held that, by excepting to the answer, he admits the validity of the plea. Hatch v. Bancroft-Thompson Co., 67 Fed. 802. A motion to strike out an insufficient plea is not correct practice. The plea should be set down for argument. Corlies v. Corlies' Ex'rs, 23 N. J. Eq. 197. In a few cases a demurrer to a plea has been permitted. Goodyear v. Toby, 6 Blatchf. 130, Fed. Cas. No. 5,585; Beard v. Bowler, 2 Bond, 13, Fed. Cas. No. 1,180; Klepper v. Powell, 6 Heisk. (Tenn.) 506. Objections to the form or regularity of the plea must be made by exceptions. Kellner v. Insurance Co., 43 Fed. 623; Suydam v. Johnson, 16 N. J. Eq. 112; Armengaud v. Coudert, 27 Fed. 247. Whether defendant may set up a certain defense by plea may be determined on a motion to strike the plea from the files, where the question is discussed on its merits in the briefs. Union Switch & Signal Co. v. Philadelphia & R. R. Co., 69 Fed. 833. A plea, if the only defense, must allege some fact which is an entire bar to the suit, or some substantive part of it; and if defective in this respect, whether true or false, the plaintiff should move to set it aside for insufficiency. Newton v. Thayer (1835) 17 Pick. (Mass.) 129. Where a motion is made to strike out a plea on the ground only that it does not fully answer the bill and presents no bar to relief, an objection cannot be taken at the hearing of the question so raised that the plea was not sworn to, want of an oath being a defect of form only. Craig v. McKinney, 72 Ill. 305. Eq. Rule 38 provides: "If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose." See Poultney v. City of Lafayette, 3 How. 81; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784. But a plea, without the certificate and verification required by rule 31, may be disregarded. National Bank v. Insurance Co., 104 U. S. 54. So, also, where there has been no notice under rule 4. Newby v. Railway Co., 1 Sawy. 63, Fed. Cas. No. 10,145. "No formal order in writing upon the minutes is necessary to set the demurrer down for argument, though that would be a better practice, no doubt, as it would be to set an equity case down for hearing formally, which is rarely done at all. When the case is ready for hearing, or the demurrer or plea is ready to be argued, the parties appear, informally, in court, and proceed with the matter; no at-

lication traversing the plea. In such a case the only question to be tried is the truth of the plea. "The equity of the bill stands admitted for all the purposes of the suit, as in the case of a declaration to which the defendant has pleaded in confession and avoidance." [2] It is on this principle that a plea excuses defendant from making a discovery. A complainant's right to discovery is limited to a discovery of such material facts as relate to his own case about to come on for trial, and which the defendant does not by his form of pleading admit. "It does not extend to a discovery of the manner in which the defendant's case is to be exclusively established, or to evidence which relates exclusively to his case." [3] Now, upon the trial of an issue upon a plea, complainant's case is all admitted (with certain exceptions hereafter noticed). The plea alone is the subject of proof, and the proof of that is defendant's case, as to which complainant is entitled to no discovery. If the plea is proved, complainant is in the same predicament as when a demurrer to his bill has been sustained. If the plea is not proved, complainant is entitled to a decree if the allegations of the bill are sufficient, for they stand admitted.[4] If the plea is found insufficient upon the argument,

tention being paid to a formal entry setting the hearing down in writing on the minutes, order book, or docket. That practice, regular and proper as it may be, does not and has never obtained among us. The minutes show that the demurrer or plea was argued, or the hearing finally had, as the case may be, and by necessary implication the proper setting down is and may be assumed, as it will be in this case; and the application to dismiss the bill for noncompliance with rule 38 is refused." Electrolibration Co. v. Jackson, 52 Fed. 773, 774. Where the plea is set down for argument with replication, the truth of all facts well pleaded is admitted. Kellner v. Insurance Co., 43 Fed. 623.

[2] Langd. Eq. Pl. 98.

[3] Wig. Disc. § 27.

[4] Kennedy v. Creswell, 101 U. S. 641. Where a replication to a plea is filed, the truth of the plea is the only question to be tried; and, if established, it is a bar to so much of the bill as it professes to cover. Hurlbut v. Britain, Walk. (Mich.) 454. "If the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred, even though the plea is not good either in point of form or subject." Daniell, Ch. Pl. & Prac. 697. Citing, inter alia, Flagg v. Bonnel, 10 N. J. Eq. 82; Fish v. Miller, 5 Paige (N. Y.) 26; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178. "If a defendant pleaded a false plea, and it be so found, what is next to be done? Is it to be merely over ruled, and an order made that he answer further, as in case of overruling a

the constructive almission made by the plea cannot be used against the defendant. The only effect of overruling the plea is to call upon the defendant for a further defense, either by way of answer, or, if it be permitted, by a second plea.[6] If the complainant files a replica-

demurrer or of overruling a plea for insufficiency? This is not the usual course. Having put the plaintiff to the trouble and delay of an issue, the defendant cannot, after it is found against him, claim the right to file an answer, although, if the complainant desires a discovery, which the plea sought to avoid, he may undoubtedly insist upon it. But that is the complainant's right, not the defendant's. Lord Hardwicke said: 'All pleas must suggest a fact; it must go to a hearing; and, if the party does not prove that fact which is necessary to support the plea, the plaintiff is not to lose the benefit of his discovery, but the court may direct an examination on interrogatories in order to supply that.' Brownsword v. Edwards, 2 Ves. Sr. 243." Kennedy v. Creswell, 101 U. S. 641, 644. Chancellor Walworth, in a case before him, where the defendant produced no evidence to establish the truth of his plea, said: "Where a plea in bar to the whole bill is put in, if the complainant takes issue thereon he admits the sufficiency of the plea, and leaves nothing in question but the truth thereof. If at the hearing the plea is found to be true, the bill must be dismissed. But, if the plea is untrue, the complainant will be entitled to a decree against the defendant in the same manner as if the several matters charged in the bill had been confessed or admitted. If a discovery is necessary to enable the complainant to obtain the relief sought for by his bill, the defendant cannot evade answering by putting in a plea which turns out to be false. In such a case, after the plea is overruled as false, the complainant may have an order that the defendant be examined on interrogatories before a master as to the several matters in relation to which a discovery was sought by the bill." Dows v. McMichael, 2 Paige (N. Y.) 345; Kennedy v. Creswell, 101 U. S. 641, 644. In Battelle v. Mill Co., 16 Lea (Tenn.) 355, a majority of the court held that a defendant had the right to answer over to the merits after the trial of his plea and a finding that it was false, notwithstanding plaintiffs insisted that they were entitled to a final decree. The court said: "The true principle is that a decision on a plea shall be held to conclude all that was in issue on that trial for all the purposes of that case, but matter not in any way put in issue, investigated, or determined by that trial shall be open for investigation, under such pleadings as the parties may present, and on such issues the court shall act, subject to revision by this court." Under Eq. Rule 33, providing that if on an issue the facts stated in a plea are determined for the defendant they shall avail him as far as in law and equity they ought to avail him, the decision of the cause does not depend wholly on the truth of the allegations of the plea, but complainant may avoid it by proof of other facts. Elgin Wind-Power & Pump Co. v. Nichols, 12 C. C. A. 578, 65 Fed. 215. Cf. Gernon v. Boccaline, 2 Wash. C. C. 199, Fed. Cas. No. 5,366.

[6] See post, p. 429.

tion to a plea without argument as to its sufficiency, he is deemed to admit the plea to be good in point of law, and its truth in point of fact is the only matter in question.[7] "When issue is thus taken upon the plea, the defendant must prove the facts it sets up. If he succeeds in proving the truth of the matter pleaded, the suit, so far as the plea extends, is barred." [8]

EFFECT OF DECISION ON ARGUMENT OF PLEA.

284. An order entered on argument of a plea is interlocutory merely, and must be followed by a final order or decree to terminate the suit.

285. Where a plea to the whole bill is allowed, defendant is relieved from answering the bill, and unless complainant amends his bill, or traverses the plea by a replication, its truth will be deemed admitted, and the bill will be dismissed.

286. Where a plea to a part only of a bill is allowed, defendant is relieved from answering that part, and unless complainant traverses the plea its truth will be admitted, and the suit must be proceeded in as though that part of the bill had never been inserted.

287. Where a plea to the whole bill is overruled, the usual practice is to rule the defendant to answer the bill, and, if he neglects to do so, the bill will be taken pro confesso, or complainant may have an attachment to compel an answer.

288. Where a plea to a part only of the bill is overruled, the complainant must except to the accompanying answer for insufficiency when he wishes to obtain an

[7] Myers v. Dorr, 13 Blatchf. 22, Fed. Cas. No. 9,988; Hughes v. Blake, 6 Wheat. 453; McEwen v. Broadhead, 11 N. J. Eq. 129. Where the plaintiff sets the cause for hearing without replying to the plea, the truth of the plea is deemed admitted. Leeds v. Insurance Co., 2 Wheat. 380; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784. See, also, supra, note 5.

[8] 1 Barb. Ch. Prac. 119. See post, p. 428, for federal rule.

answer to the part of the bill which was attempted to be covered by the plea.

289. Where a plea is neither sustained nor overruled, but it is ordered that its benefit shall be saved to the defendant at the hearing, the effect of the order is to permit the complainant to reply and go into evidence without admitting the sufficiency of the plea, and in the meantime such part of the bill as is covered by the plea is not to be answered.

290. Where a plea is ordered to stand for an answer, it will be deemed a sufficient answer, unless leave to except is saved to the complainant, or the plea is accompanied by an answer which will enable the complainant to except without special leave. But the sufficiency of the matter set up as a defense is not determined.

The proceedings upon argument of a plea are nearly the same, mutatis mutandis, as those upon the argument of a demurrer. A plea, upon argument, may be either allowed simply or overruled; or the benefit of it may be saved to the defendant at the hearing, or it may be ordered to stand for an answer. In this last respect there is a difference between demurrers and pleas. "A demurrer, being a mute thing, cannot, like a plea, be ordered to stand for an answer." [1]

Allowance of Plea—Amendment of Bill.

"If a plea is allowed simply, it is thereby determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, be true." [2] The order allowing a plea is necessarily interlocutory merely, for, as has been

§§ 284–290. [1] Barb. Ch. Prac. 112; Anon., 3 Atk. 530.

[2] Daniell, Ch. Pl. & Prac. 697; Bassett v. Manufacturing Co., 43 N. H. 253. "When a plea is allowed, it is considered as a full answer; and an injunction obtained till answer will be dissolved upon application, as a matter of course." Daniell, Ch. Pl. & Prac. 698; Philips v. Langhorn, 1 Dick. 148. The allowance of the plea does not ipso facto dissolve the injunction. Ferrand v. Hamer, 4 Mylne & C. 143; Fulton v. Greacen, 44 N. J. Eq. 443, 15 Atl. 827.

seen, the complainant may take issue upon the truth of the plea, and, under the liberal practice that prevails in equity, the objection raised by the plea may frequently be obviated by amendment.[3] The allowance of a plea must be followed by a final order or decree to terminate the suit.[4] By strict practice, where a plea to the whole bill is sustained, but two courses are open to the plaintiff,—he must either traverse the plea by a replication, in the same manner that he would do if the defendant had simply put in an answer to the bill in the usual way, which imposes upon defendant the burden of proving his plea,[5] or he must amend his bill if an amendment is permitted. If the complainant fails to traverse the plea, its truth will be admitted, and, its sufficiency having been already determined, the bill must be dismissed, unless it is amended. A similar result follows if the plea is traversed but the defendant succeeds in establishing its truth.[6] In the federal courts the practice is governed by Equity Rule 33, which provides that "if, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him." It is conceived that this rule changes the practice only in cases where the complainant has filed a replication to the plea instead of having it set down for argument as to its sufficiency. Under the former practice in such a case he was deemed to admit the sufficiency of the plea, and, if the finding was against him on the facts, the bill, or such portion as was opposed by the plea, would be dismissed, irrespective of the sufficiency of the plea.[7] The rule in question certainly changes this practice, and permits the court to consider the sufficiency of the plea in such a case.[8] But, when a

[3] Daniell, Ch. Pl. & Prac. 698.

[4] Tarleton v. Barnes, 2 Keen, 632.

[5] Daniell, Ch. Prac. 697. See U. S. v. Dalles Military Road Co., 140 U. S. 599, 617, 11 Sup. Ct. 988; McEwen v. Broadhead, 11 N. J. Eq. 129.

[6] Supra, p. 424, and notes 4, 7.

[7] Foster, Fed. Prac. § 142. "Having put the plaintiff to the trouble or delay of an issue, the defendant cannot, after it has been found against him, claim the right to file an answer, although, if the complainant desires a discovery which the plea sought to avoid, he may undoubtedly insist upon it." Kennedy v. Creswell, 101 U. S. 641, 644.

[8] 1 Beach, Mod. Eq. Prac. § 329; Pearce v. Rice, 142 U. S. 28, 12 Sup. Ct. 130. But see Myers v. Dorr, 13 Blatchf. 22, Fed. Cas. No. 9,988; Cottle v. Krementz, 25 Fed. 494; Matthews v. Manufacturing Co., 2 Fed. 232.

plea has been allowed on argument, it has already been determined how far in law and equity the plea ought to avail the defendant, and, upon a subsequent trial of the truth of the plea, the rule can have no application.

Leave to amend will invariably be given when the defect is a merely formal one, but, where the defect cannot be obviated by amendment, none will be permitted. U. S. Equity Rule 35 provides that, if upon the hearing a plea is allowed, the court may, in its discretion, allow the complainant to amend upon such terms as it shall deem reasonable.[9]

Where a plea to only a part of a bill is sustained, it is thereby determined to be a full bar to such part of the bill as it covers, provided it is true in point of fact. If, upon issue joined, the plea is proved true, the part of the bill opposed is completely barred, and the suit proceeds as though such part had never been inserted in the bill. If the complainant fails to traverse the plea by replication, its truth is deemed admitted, and the same result follows. Complainant may, of course, be permitted, in a proper case, to amend his bill.[10]

Overruling Plea.

When a plea to the whole bill is overruled, it is thereby simply determined that the matter of the plea constitutes no excuse for not answering, and the defendant must consequently answer the bill within such time as may be prescribed by the practice of the court.[11] If he fails to put in an answer within the time limited,

[9] Generally, as to amendments, see National Bank v. Carpenter, 101 U. S. 567; Hunt v. Rousmaniere, 2 Mason, 342, Fed. Cas. No. 6,898; Ketchum v. Driggs, 6 McLean, 14, Fed. Cas. No. 7,735; Dwight v. Humphreys, 3 McLean, 104, Fed. Cas. No. 4,216.

[10] The reasoning is the same as in the case of a plea to the whole bill. See cases cited supra.

[11] Barb. Ch. Prac. p. 124. "The effect of overruling a plea is to impose upon the defendant the necessity of making a new defense. This he may do either by a new plea or an answer, and the proceedings upon the new defense will be the same as if it had been originally made." Daniell, Ch. Pl. & Prac. 701. See, also, Beach, Mod. Eq. Prac. § 328; McKewan v. Sanderson, L. R. 16 Eq. 316. Or he may, in a proper case, be allowed to amend his plea, Loving v. Fairchild, 1 McLean, 333, Fed. Cas. No. 8,556; and, if the truth of every distinct allegation in the plea is not established, the plea will be overruled as false, Dows

the bill may be taken as confessed, and a final decree entered accordingly, or complainant may have an attachment to compel an answer.[12]

Where the plea is to only a part of the bill, and there is an answer to the residue, even if the plea is overruled and the defendant fails to answer further, the bill cannot be taken pro confesso. In such a case, if the complainant wishes to obtain an answer to the part of the bill which was attempted to be covered by the plea, he must except to the answer already put in for insufficiency.[13] The complainant may except to the accompanying answer before argument of the plea, but in such case he will be deemed to admit the validity of the plea.[14] After a plea has been overruled, no other plea or demurrer can be filed without leave of court.[15] Where a plea to the bill has been overruled on the merits, the same matter cannot be set up in the answer as a bar to the suit without the special permission of the court.[16]

v. McMichael, 6 Paige (N. Y.) 139. A second plea may be filed only by leave of court. Wheeler v. McCormick, 8 Blatchf. 267, Fed. Cas. No. 17,498; Lamb v. Starr, Deady, 350, Fed. Cas. No. 8,021. Eq. Rule 34 provides as follows: "If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay; and, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof the bill shall be taken against him pro confesso, and the matter thereof proceeded in and decreed accordingly." Under this rule, defendant is entitled, as a matter of right, to answer after plea overruled. Wooster v. Blake, 7 Fed. 816; Sims v. Lyle, 4 Wash. C. C. 303, Fed. Cas. No. 12,891; Dalzell v. Manufacturing Co., 149 U. S. 315, 13 Sup. Ct. 886. The defendant must be ruled to answer before the bill can be taken pro confesso. Halderman v. Halderman, Hempst. 407, Fed. Cas. No. 5,908.

[12] 1 Daniell, Ch. Pl. & Prac. 701. A reasonable time will be allowed defendant within which to answer. Cunningham v. Campbell, 3 Tenn. Ch. 488.

[13] Barb. Ch. Prac. p. 124; Strickland v. Mackenzie, 1 Dick. 49.

[14] Barb. Ch. Prac. p. 124.

[15] Barb. Ch. Prac. p. 124; Wheeler v. McCormick, 8 Blatchf. 267, Fed. Cas. No. 17,498; McKewan v. Sanderson, L. R. 16 Eq. 316.

[16] Townsend v. Townsend, 2 Paige (N. Y.) 413; Coster v. Murray, 7 Johns. Ch. (N. Y.) 167, 172.

Saving Benefit of Plea to Hearing.

"It sometimes happens that, upon the argument of a plea, the court considers that although, so far as then appears, it may be a good defense, yet there may be matter disclosed in evidence which, supposing the matter pleaded to be strictly true, would avoid it. In such a case the court, in order that it may not preclude the question by allowing the plea, directs that the benefit of it shall be saved to the defendant at the hearing." [17] "Thus, in the case of Heartt v. Corning,[18] a plea of settled partnership accounts was held to be well pleaded; but, as facts might be disclosed justifying a decree to surcharge and falsify, the benefit of it was saved until the hearing. To have allowed it, simply would have made it a conclusive bar." [19] The effect of an order for this purpose is to give the complainant an opportunity of replying and going into evidence, without admitting the sufficiency of the plea.[20] When the benefit of the plea is reserved to the hearing, such part of the bill as is covered by the plea is not to be answered.[21] "Unless anything is said in the order in such cases with respect to the costs of the plea, they abide the result of the hearing; the order saving the benefit of the plea to the hearing being in fact nothing more than an order for the adjournment of the discussion." [22]

Plea Ordered to Stand for an Answer.

"When a plea is allowed to stand for an answer, it is determined that it contains matter which, if put in the form of an answer, would have constituted a valid defense to some material part of the matters to which it is pleaded as a bar, but that it is not a full defense to the whole matter which it professes to cover, or that it is informally pleaded, or is improperly offered as a defense by way of

[17] 1 Daniell, Ch. Pl. & Prac. 699. See, also, Young v. White, 17 Beav. 532.

[18] 3 Paige (N. Y.) 566, 572.

[19] Daniell, Ch. Pl. & Prac. 699, note 5. See, also, Barb. Ch. Prac. 121.

[20] See Story, Eq. Pl. § 698; Coop. Eq. Pl. 233. The effect of ordering a plea to a bill in equity "to stand over till the hearing, saving to the defendant the benefit thereof," is to adjudge the plea to be prima facie a bar, leaving the plaintiff, on filing a replication, to prove any circumstances which in equity should preclude the defendant from relying upon it. Hancock v. Carlton (1856) 6 Gray (Mass.) 39.

[21] Daniell, Ch. Pl. & Prac. 700.

[22] Daniell, Ch. Pl. & Prac. 700. See Heartt v. Corning, 3 Paige (N. Y.) 566.

plea, or that it is not properly supported by answer." [23] If a simple plea to the whole bill, unaccompanied by an answer, is allowed to stand for an answer, without reserving to the complainant the right to except, it is to be deemed a sufficient answer, though not necessarily a full and perfect defense to the whole bill.[24] But if the plea is ordered to stand for an answer, with liberty to except, or is accompanied by an answer, which will enable the complainant to except without such special leave, the master, upon a reference of the exceptions, must inquire and ascertain whether the bill is fully answered, taking the plea as a part of that answer,[25] unless the court, in permitting the plea to stand for an answer, as in the case of Kirby v. Taylor,[26] declares as to what part of the bill it is to be considered a good defense. The court, however, sometimes prohibits the complainant from calling upon the defendant, by exceptions, to discover particular matters as to which he is not legally bound to answer. Thus, in Brereton v. Gamul [27] and in Bayley v. Adams [28] the pleas were ordered to stand for answers, with liberty to the complainants to except, save as to calling upon the defendants for accounts.[29]

FORM OF PLEAS.

291. Pleas in equity may be divided into three classes, according to their nature. These are:

(a) **Pure pleas** (p. 433).

(b) **Negative pleas** (p. 435).

(c) **Anomalous pleas** (p. 436).

[23] Barb. Ch. Prac. 122. See Lube, Eq. Pl. 46; Daniell, Ch. Pl. & Prac. 700.

[24] Sellon v. Lewen, 3 P. Wms. 239; Barb. Ch. Prac. 122; Kirby v. Taylor, 6 Johns. Ch. (N. Y.) 242; Goodrich v. Pendleton, 3 Johns. Ch. (N. Y.) 384, 394; Orcutt v. Orms, 3 Paige (N. Y.) 459, 461.

[25] Barb. Ch. Prac. 122; Orcutt v. Orms, 3 Paige (N. Y.) 461. See Daniell, Ch. Pl. & Prac. 700.

[26] 6 Johns. Ch. (N. Y.) 242, 254.

[27] 2 Atk. 240.

[28] 6 Ves. 586.

[29] See, also, McCormick v. Chamberlin, 11 Paige (N. Y.) 543; Bell v. Woodward, 42 N. H. 181, 195, 196; Bassett v. Manufacturing Co., 43 N. H. 249, 254.

SAME—PURE PLEAS.

292. A pure plea is one which sets up as a defense new matter of fact not apparent on the face of the bill.

The primary requisite of a pure plea, in general, is that it should be founded on new matter not apparent on the face of the bill; for if the matter is apparent on the bill it is the proper subject of a demurrer, and not of a plea.[1] In other words, a plea must aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, rest on facts stated in the bill.[2]

Another requisite of a pure plea is that it should not only reduce the cause to a single point, but it should also be such a point as is issuable, and also such as is material to delay, dismiss, or bar the bill; for, if the issue tendered is immaterial, it can never finally dispose of the cause.[3]

Another requisite of a pure plea is that it should be direct and positive, and not state matters by way of argument, inference, and conclusion, which have a tendency to create unnecessary prolixity and expense. In this respect the rules of pleading in equity are analogous to the rules of law.[4] Thus, in a suit by an executor, where the probate was not sufficiently stamped, it was held that the defendant's plea should not state matters affirmatively to show such insufficiency, but should deny that the complainant was executor.[5]

Another requisite of a pure plea is that it should clearly and distinctly aver all the facts necessary to render the plea a complete equitable defense to the case made by the bill, so far as the plea extends, so that the complainant may, if he chooses, take issue upon

§§ 291–292. [1] See ante, pp. 92, 93, 411.

[2] Story, Eq. Pl. § 660, and cases cited supra, p. 411, note 10.

[3] Story, Eq. Pl. § 661; Morison v. Turnour, 18 Ves. 175. See Chapman v. Turner, 1 Atk. 54; Ritchie v. Aylwin, 15 Ves. 79, 82.

[4] Story, Eq. Pl. § 662; Roberts v. Madocks, 16 Sim. 55; Jerrard v. Saunders, 2 Ves. Jr. 187; McCloskey v. Barr, 38 Fed. 165; Carew v. Johnston, 2 Schoales & L. 305; Hardman v. Ellames, 5 Sim. 640. See Shipman, Com. Law Pl. (2d Ed.) § 345.

[5] Roberts v. Madocks, 16 Sim. 55.

it.[6] Averments are also necessary to exclude intendments which would otherwise be made against the pleader; and the averments must be sufficient to support the plea,[7] as, in deference to a rule in equity analogous to that at common law, the plea, if ambiguous, will be taken most strongly against the party offering it.[8]

We shall hereafter notice the instances in which a supporting answer must accompany a plea, but it may be well to mention here that, so far as can be gathered from the principles laid down by the leading authorities, a pure plea never requires such support. The statement of Judge Story on this point is positive,[9] and, while in Daniell there are explanations which would seem to show that the fact is otherwise, it will be found, upon examination, that the rule is the same.[10] It could hardly be otherwise, in view of the accepted definition of this plea, which limits it to the statement of matter strictly dehors the bill; that is, to matter in the nature of confession and avoidance, which, admitting as true all the allegations of the bill, still presents a complete defense, if true. Some confusion has arisen from the assumption that "pure" and "affirmative" pleas were synonymous terms, and also from an apparent distinction, regarding anomalous pleas, between cases where a complainant plainly frames his allegations to anticipate and avoid an expected defense, and those where he merely alleges, as part of his case, equitable facts which are in his favor, and merely inconsistent with such defense. Pure pleas, while affirmative, are not the only ones which may present affirmative matter, and we shall hereafter see that,

[6] Beames, Pl. Eq. 23, 24, and cases cited; Allen v. Randolph, 4 Johns. Ch. (N. Y.) 693; McCloskey v. Barr, 38 Fed. 165; Story, Eq. Pl. § 665. When taken to the whole bill, it must be so complete that, if true, all the equities of the bill will be defeated, and it must be sufficient to determine the whole case. Madison, W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co., 5 Wis. 173. See Lyon v. Dees, 84 Ala. 595, 4 South. 407; Wesling v. Schrass, 33 N. J. Eq. 42.

[7] See Brownsword v. Edwards, 2 Ves. Sr. 243, 245, and note; Morison v. Turnour, 18 Ves. 182; Hardman v. Ellames, 5 Sim. 640; Quint v. Little, 4 Me. 495; Hancock v. Carlton, 6 Gray (Mass.) 39; Whitlock v. Fiske, 3 Edw. Ch. (N. Y.) 131. See, also, Hoskins v. Cole, 34 Ill. App. 541.

[8] The maxim at law is "ambiguum placitum interpretari debet contra proferentem."

[9] Story, Eq. Pl. § 670. Citing Beames, Pl. 34, 35.

[10] 1 Daniell, Ch. Pl. & Prac. 615.

where the bill charges equitable facts such as those last mentioned, —as fraud or want of notice,—a plea setting up the expected defense must be accompanied by an answer, and could hardly be anything but an anomalous plea if containing, in itself, more than the bare denial proper for a negative plea.[11]

SAME—NEGATIVE PLEAS.

293. A negative plea is one which opposes the whole or a part of a bill by a denial of some one fundamental allegation upon which the right of complainant depends.

It was formerly a question of considerable difficulty whether a purely negative plea to a bill, corresponding to the traverse of the common law, was a legitimate mode of defense in a court of equity, but it is now firmly settled that such a plea is good.[1] As its name indicates, it is a denial by the defendant of some one fundamental fact or allegation in the bill, without which the complainant cannot recover, and the determination of which in favor of the defendant will therefore terminate the suit.[2] Thus a plea denying that the defendant was a partner has been held good to a bill seeking an account of partnership transactions.[3] The reasoning upon which a plea of this character is supported is that otherwise "any person falsely alleging a title in himself might compel any other person to make any discovery which that title, if true, would enable him to require, however injurious it might be to the person thus improperly brought into court."[4] In other words, by alleging a title, however false, a bill in equity might be sustained against any person for anything, so far as to compel an answer, and thus bring about an improper disclosure not only of commercial transactions,

[11] Post, p. 444.

§ 293. [1] See the discussion of this question in Beames, Pl. Eq. 123–128; Langd. Eq. Pl. §§ 102, 146.

[2] Champlin v. Champlin, 2 Edw. Ch. (N. Y.) 362, 364; Benson v. Jones, 1 Tenn. Ch. 498.

[3] Story, Eq. Pl. §§ 660, 668. See Evans v. Harris, 2 Ves. & B. 361; Sanders v. King, 6 Madd. 61; Thring v. Edgar, 2 Sim. & S. 274. See, also, Denys v. Locock, 3 Mylne & C. 205.

[4] Story, Eq. Pl. § 669; Mitf. Eq. Pl. (Jeremy's Ed.) 231.

but also of the private affairs of families, and this form of defense by a special traverse is therefore sanctioned.

SAME—ANOMALOUS PLEAS.

294. An anomalous plea is one which sets up a defense which has been anticipated in the bill, and sought to be avoided, and denies the circumstances relied upon in avoidance, or which opposes the bill by an affirmative defense, with an express denial or traverse of any facts therein inconsistent with such new matter.

"There is a third class of plea, which may be termed the 'anomalous plea,' which is applicable when the plaintiff has anticipated a legitimate plea, and has charged an equity in avoidance of it; e. g. when, having stated his original equity, he states that a subsequent release was given, or is pretended by the defendant to have been given, and charges fraud in obtaining such release. In this case the release or other original defense may be pleaded, with averments denying the fraud, or other equity charged in avoidance. The term 'anomalous' is applicable to such plea, because it does not tender an independent issue, but sets up anew the impeached defense, with averments in denial of the impeaching equity." [1] It is both affirmative and negative.

It would seem, from a cursory examination of the authorities, that an anomalous form of plea is necessary only when the anticipated defense has been affirmatively avoided, without being admitted; but

§ 294. [1] Adams, Eq. p. 338. "The bill, it will have been seen, anticipates the defense of an account stated, and to it replies affirmatively by charging fraud. The defendant, therefore, if he wishes to plead an account stated, must not only set up the account, but must traverse also, in the plea, the anticipatory replication thereto which the bill contains; that is, the charge of fraud. Such a plea is called an 'anomalous' one, because it is partly affirmative and partly negative,—affirmative in setting up the account, and negative in denying the fraud. Story, Eq. Pl. § 802; Langd. Eq. Pl. § 101." Harrison v. Farrington, 38 N. J. Eq. 1, 2. When matter that might be pleaded in bar is anticipated and avoided in the bill, a plea setting up such matter must deny the avoiding facts alleged in the bill. Henderson v. Chaires, 35 Fla. 423, 17 South. 574.

this position, in view of the statements of eminent writers, can hardly be more than partially true, unless the phrase "affirmatively avoided" is taken as including all statements of fact which the bill contains inconsistent with the truth of the defense to be set up, and apparently alleged without any intention of anticipating and avoiding such defense,—in other words, as expressed in the old rule, all statements or charges in the bill affording equitable circumstances in favor of the complainant's case against the matter pleaded.[2] In regard to necessary averments in the plea for the purpose of meeting allegations of this character, Daniell says: "Another office of averments in a plea is to exclude intendments, which would otherwise be made against the pleader; for, if there is any charge in the bill which is an equitable circumstance in favor of the plaintiff's case against the matter pleaded, such as fraud or notice of title, the court will intend the matters so charged against the pleader, unless they are met by averments in the plea. * * * The necessity for the introduction of such averments into a plea is obvious, when we consider that a plea, for the purpose of deciding on the validity of it, like a demurrer, admits all the facts stated in the bill to be true, so far as they are not controverted by the plea; so that, whenever matters of fact are introduced in the bill which, if true, would destroy the effect of the matter pleaded, the plea will be overruled, unless such matters are controverted by the averments. * * * A negative averment, therefore, is that species of averment which is made use of to contradict any statement or charge in the bill which, if uncontradicted, would be to do away with the effect of the matter pleaded. The most common case in which this form of averment is used is where notice or fraud is alleged in the bill, for the purpose of obviating some anticipated defense which may be set up by the defendant."[3] The same author goes on to state, in substance, that in case of such negative averments, as where the plea denies fraud or want of notice, there must also be a supporting answer, containing the same denials and giving such discovery as the complainant asks for,[4] and this appears to be sanctioned by other authority.[5] The modern rule, as hereafter stated, is not in conflict, there being, in the class of cases under consideration, facts or circumstances charged

[2] 1 Daniell, Ch. Pl. & Prac. 615.
[3] 1 Daniell, Ch. Pl. & Prac. 612, 614.
[4] 1 Daniell, Ch. Pl. & Prac. 615.
[5] See Story, Eq. Pl. §§ 673–676.

which would, if admitted, disprove the truth of the plea.[6] The question is, then, as to whether a plea of the character indicated is an anomalous plea or not; and it seems that it must be, since, as we have already seen, a pure plea requires no answer,[7] and a negative plea does not, in itself, set up any matter of defense whatever, but simply advances a bare denial.

ANSWERS IN SUPPORT OF PLEAS.

295. An answer in support of a plea is one incorporated therewith giving discovery to which plaintiff is entitled for use on the trial of the issue raised by the plea.

296. Whenever a bill is so framed as to call for a proper discovery, and such discovery is material to complainant's, as distinguished from defendant's, case, upon the trial of the plea, the plea must be supported by an answer giving the required discovery.

297. Under the modern practice, the bill must plainly seek a discovery as to all facts or matter inconsistent with, and charged, directly or indirectly, in anticipation of, the proposed defense, or the plea will require no supporting answer. Although the bill expressly charges matter in avoidance, and prays discovery regarding it, the plea, if sufficient as a defense, admitting the truth of the whole bill, including all facts which the discovery sought would tend to prove, will still require no answer.

298. When the bill waives an answer under oath, it seeks no discovery, and consequently a plea need not be supported by an answer.

[6] See, also, 1 Daniell, Ch. Pl. & Prac. §19, 620; Bayley v. Adams, 6 Ves. 586, 598; Chapin v. Coleman, 11 Pick. (Mass.) 331; Bolton v. Gardner, 3 Paige (N. Y.) 273; Goodrich v. Pendleton, 3 Johns. Ch. (N. Y.) 384; Lingan v. Henderson, 1 Bland (Md.) 236, 282; Lord Portarlington v. Soulby, 6 Sim. 356; Whitchurch v. Bevis, 2 Brown, Ch. 559. See, also, Hunt v. Johnson, 96 Ala. 130, 11 South. 387; Evans v. Harris, 2 Ves. & B. 361, 364.

[7] Ante, p. 434.

299. Under the United States equity rules, where the bill specially charges fraud and combination, a plea to such part must be accompanied with an answer explicitly denying the fraud and combination and the facts on which the charge is founded.

It has been seen that an ultimate purpose of the use of pleas is to avoid making a discovery. It is proposed here to examine briefly the extent to which the various kinds of pleas secure this end. In some cases a plea obviates the necessity of making any discovery. In other cases the plea must be supported by an answer giving a limited discovery. The question as to whether or not, and how far, a plea must be supported by an answer, is simply the question, in another form, as to what discovery the plaintiff is entitled to under the circumstances. The extent of plaintiff's right to a discovery is admirably summarized by Mr. Wigram as follows:[1] "Proposition 1. The pleadings in a cause and rules of practice, unconnected with the laws of discovery, determine a priori what question or questions in the cause shall first come on for trial; and the right of a plaintiff to discovery is in all cases confined to the question or questions in the cause which, according to the pleadings and practice of the courts, is of are about to come on for trial. Proposition 2. It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit. Proposition 3. The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the 'plaintiff's case,' and does not extend to a discovery of the manner in which the 'defendant's case' is to be exclusively established, or to evidence which relates exclusively to his case."

Speaking of the first of the above propositions, the same author makes very clear the theory upon which pleas and demurrers protect a defendant from a discovery, and the limit of the doctrine. "If a defendant demurs, the demurrer will arrest the progress of the cause until the point or points raised by the demurrer shall have

§§ 295–299. [1] Wig. Disc. p. 15.

been tried; and, as a plaintiff cannot want discovery for the purposes of a trial in which his own statement of his case is admitted, he will not be entitled to discovery before such trial. If the defense be by plea, the plea, in like manner, will arrest the progress of the cause until the plea shall have been argued; and, if the bill be not so framed as to make discovery necessary for the trial of the plea itself, the case will fall within the same reasoning, and be in the same predicament, as that of a demurrer. If the defense be by plea, but the bill be so framed as to make discovery necessary for the trial of the plea, here, also, the plea will arrest the progress of the cause until the plea shall have been tried; but the first proposition does not determine that such discovery as may be necessary to try the plea itself shall not be given. The plaintiff's right to such discovery will be considered presently. If the defense be by answer, the progress of the cause to a hearing will not be suspended by the form of the defense, and there is nothing in the first proposition by which the plaintiff's right to discovery is excluded from any point in the cause."[2]

Discovery must be Specially Called for by the Bill.

Plaintiff is obviously not entitled to any discovery where he seeks none by his bill. But every bill in equity may be said to seek a discovery. Accordingly, under the old practice, whenever the bill contained statements or charges of facts material to plaintiff's case upon the trial of the plea, an answer in support of the plea was always necessary.[3] "Under the present practice, if no interrogato-

[2] Wig. Disc. p. 30.

[3] Daniell, Ch. Pl. & Prac. 615. "When there is a plea and an answer in support thereof, and a hearing is had without replication, the rule is that every fact stated in the bill, and not denied by the averments in the plea, or by the answer in support of the plea, must be taken as true. Roche v. Morgell, 2 Schoales & L. 721, 726; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178, 195; Brereton v. Gamul, 2 Atk. 240, 241; Meder v. Birt, Gilb. Eq. 185; Hony v. Hony, 1 Sim. & S. 568; Mitf. Eq. Pl. 299; Rhode Island v. Massachusetts, 14 Pet. 210, 257. The matter of the plea is that the mortgagors had a homestead in the mortgaged premises, and the answer in support of the plea denies the allegations in the bill to the effect that the moneys secured by the mortgage were for the payment of obligations contracted for the erection of improvements thereon, and a denial of its voluntary execution. The practice adopted here was incorrect. The hearing first upon the plea, distinct from the answer in support thereof, and afterwards upon the bill and answer apart

ries are filed, the defendant need only aver the facts necessary to render the plea a complete equitable bar to the case made by the bill, and need not put in any answer in support of the plea. If interrogatories are filed, the principles of the old cases, with respect to an answer supporting the plea, still remain in force."[4] Substantially the same rule has been declared in a recent case in the federal court.[5] In this last case, speaking of an anomalous plea, the court said: "It is not necessarily to be overruled, because it is not supported by an answer. A plea which contains in itself a full defense to the bill need not be supported by an answer, whether the bill does or does not aver facts for the purpose of avoiding the anticipated defense. It was formerly otherwise, in cases where the anticipatory averments of the bill were sufficient to overthrow the equity of the defense. An anomalous plea is only good against the original subject-matter which constitutes the equity of the bill, and is ineffectual against the supplemental matters averred to anticipate and avoid the defense; and therefore the matters in avoidance are not only required to be denied in the plea, but by the

from the plea, was erroneous. The answer here was strictly and wholly in support of the plea. It denied such allegations in the bill as were supposed to avoid the anticipated plea, such as consent to sale and the use of the moneys in improving the homestead property. It is true that the defendant files the answer as an answer 'to the residue of the bill of complaint not covered by her plea.' Upon examination, however, it is plain that it is simply in support of the plea. Stearns v. Page, 1 Story, 204, 212, Fed. Cas. No. 13,339; Story, Eq. Pl. 764. The plea is to the whole of the bill. There is no 'residue of the bill not covered by it.' The rule by which to determine the sufficiency of an answer in such a case as this is to consider every allegation in the bill as true which is not sufficiently denied by the answer. Roche v. Morgell, 2 Schoales & L. 721, 726; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178; Lawrence v. Pool, 2 Sandf. (N. Y.) 540. An answer in support of a plea cannot be regarded (as was here done) as a defense independent of the plea. Bayley v. Adams, 6 Ves. 586, 597. It is to be treated as a part of the plea. Such is the form of judgment in such a case. Rhode Island v. Massachusetts, 14 Pet. 210, 281. The answer here considered, separate and apart from the plea, does not propose to set up the full defense of homestead; and in disposing of the case by a hearing upon the bill and answer alone, the matter of the plea not being considered, the defendant was at a disadvantage not sanctioned by any rule of practice. The same was the case when the plea was considered without reference to the answer." Hart v. Sanderson's Adm'rs, 16 Fla. 264, 267.

[4] Daniell, Ch. Pl. & Prac. 615. [5] Hilton v. Guyott, 42 Fed. 249.

former practice were required to be sustained by a full answer in respect to any discovery called for.[6] In modern practice, even though the bill contains such anticipatory averments, no answer in support of the plea is necessary, unless discovery upon interrogatories is called for.[7] If interrogatories are annexed to the bill respecting material anticipatory facts, as to which the answers might tend or be evidence to countervail the plea, then the plea must be supported by an answer. * * * If he does not answer interrogatories, upon the argument of the plea, every fact which they would tend to prove is treated as proved in impeachment of the plea. But if a plea sets up a defense which appears to be a good bar, notwithstanding all these facts are admitted to be true, it is not necessary to support it by an answer."[8]

Answer under Oath Waived.

Where a bill contains a waiver of an answer under oath, whatever the frame of the bill or the form of the plea, it need not be supported by answer. Such a bill seeks no discovery, and plaintiff is entitled to none.[9]

United States Equity Rule 32—Fraud and Combination.

The thirty-second equity rule of the United States supreme court provides that, in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.[10]

[6] Adams, Eq. 338.

[7] Dawson v. Pilling, 17 Law J. Ch. 394; Webster v. Webster, 1 Smale & G. 489.

[8] Hilton v. Guyott, 42 Fed. 249, 250. Under Eq. Rule 39, an answer in support of a plea in bar is not subject to exception because it fails to answer all the specific interrogatories attached to the bill. Hatch v. Bancroft-Thompson Co., 67 Fed. 802.

[9] Story, Eq. Pl. § 672; Beames, Pl. Eq. 33, 34; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178; Heartt v. Corning, 3 Paige (N. Y.) 566.

[10] Where a plea is such that an answer is required to support it, it will be overruled unless such answer is put in. Hagthorp v. Hook, 1 Gill & J. (Md.) 270, 283.

SAME—PURE PLEAS.

300. A pure plea completely protects defendant from giving any discovery as to so much of the bill as is opposed by the plea.

A pure plea is, in substance, a plea in confession and avoidance. It admits the truth of the case made by the bill, but avoids it by setting up a single new fact, sufficient, if true, to constitute a defense to the bill, or to so much of it as the plea opposes. Upon issue joined, the truth of the plea is the sole matter to be tried; but as to this plaintiff is not entitled to any discovery, for his own case, as made by the bill, stands admitted. The plea constitutes defendant's case, and rests exclusively upon matters dehors the bill. A plaintiff's right to discovery has always been limited to a discovery of facts relating to his own case. Consequently, when a pure plea is filed, defendant need not answer so much of the bill as is covered or opposed by the plea.[1] Indeed, it is generally held that, if he should answer any part of the bill covered by the plea, the plea would be deemed waived and overruled.[2] Where the plea is to a part only of the bill, the other parts must, of course, be met by answer or otherwise; but such an answer is in no sense an answer in support of the plea.

§ 300. [1] Daniell, Ch. Pl. & Prac. 615; Story, Eq. Pl. § 681; Sims v. Lyle, 4 Wash. C. C. 303, 304, Fed. Cas. No. 12,891.

[2] See Cheatham v. Pearce, 89 Tenn. 668, 680, 15 S. W. 1080; Bangs v. Strong, 10 Paige (N. Y.) 11; Bolton v. Gardner, 3 Paige (N. Y.) 273; Stearns v. Page, 1 Story, 204, Fed. Cas. No. 13,339; Souzer v. De Meyer, 2 Paige (N. Y.) 574; Lewis v. Baird, 3 McLean, 56, Fed. Cas. No. 8,316. Ante, p. 415, and post, p. 447.

SAME—NEGATIVE PLEAS.

301. A negative plea completely protects defendant from giving any discovery as to so much of the bill as is opposed by the plea; except

EXCEPTION—Where the bill seeks a discovery by interrogatories as to the matters denied by the plea, the plea must be supported by an answer giving the required discovery as to such facts.

The above rule as to negative pleas seems very clear on principle, but there was much confusion and conflict among the cases before the rule was settled, and there has always been the greatest difficulty in applying the rule as finally settled, owing, perhaps, as Prof. Langdell suggests,[1] to a misapprehension by the courts of the meaning of the rule that, if a defendant answered to any part of the bill covered by his plea, the plea would be overruled. The present importance of the subject would not justify a critical examination of the cases. Mr. Daniell states the rule finally established as follows: "In the case of negative pleas, the rule is that, when a defendant puts in a plea which has the effect of negativing the plaintiff's title, he need not accompany it by an answer, as to any of the facts upon which that title depends, unless discovery is specially sought by the bill, and he is required to answer interrogatories as to such facts. If, however, this is done, the defendant is bound to accompany his plea by an answer as to such facts. The correctness of this rule has been questioned, but it seems to be now established."[2] Only evidence charged specifically in proof of the allegation denied by the plea need be answered.[3]

Plaintiff is entitled to a discovery as to the matters denied by a negative plea, and consequently such discovery must be given in an answer in support of the plea, because such a plea does not admit the whole of plaintiff's case. Under such circumstances, plaintiff's case is that stated in the bill, involving a negation of the truth of

§ 301. [1] Langd. Eq. Pl. § 102. [2] Daniell, Ch. Pl. & Prac. 620. [3] Langd. Eq. Pl. p. 117.

the plea, and, as already stated, plaintiff is entitled to a discovery of all matters necessary to prove his own case.[4]

"Pure and proper pleas in equity were such as set up some fact outside of the bill which would show that the bill should not be answered at all. These pleas required no answer to support them, for they would not be included in that which the party was called upon to answer. Anomalous [negative] pleas, denying a single part of the case, may, by the bill on which the whole case depended, come to be allowed, for convenience, to save trying the whole case, when the failure of that part would be fatal, and for safety against enforced discovery in a suit by those not in any manner entitled to the discovery; but, as the ground of the plea would be included in what the defendant was called upon to answer, he could not avoid the right to have at least that part answered by merely pleading to it. He must answer that, although the plea raising the objection and the answer supporting it might show that no answer to the rest of the case ought to be required." [5]

SAME—ANOMALOUS PLEAS.

302. An anomalous plea completely protects defendant from giving any discovery as to so much of the bill as is opposed by the plea; except

EXCEPTION—Where the bill seeks a discovery upon interrogatories as to matters set up in avoidance of the anticipated defense, or as to equitable facts alleged in complainant's favor and inconsistent with the truth of such defense, such matters or facts must be met by negative averments in the plea, and the plea must be supported by an answer giving the discovery to which complainant is entitled unless the plea, admitting all in opposition, still presents, in itself, a valid defense.

[4] See ante, p. 439. Defendant in a suit for accounting, raising by plea to the jurisdiction an issue of fact as to the amount in dispute, may be required to answer interrogatories in the bill pertinent to the averment of the plea, before the litigation proceeds further. Playford v. Lockard, 65 Fed. 870.

[5] Dwight v. Railroad Co., 9 Fed. 785, 788.

In the case of anomalous pleas, the affirmative matter charged in the bill in avoidance of the anticipated defense is in the nature of a replication. It constitutes the "complainants' case," within the meaning of the rule defining a complainant's right to discovery. The burden of proving it rests upon the complainant, and he is entitled to a discovery to enable him to do so. The following quotation from Prof. Langdell [1] seems to have been adopted by common consent as the best statement and explanation of the rule.[2] "If a bill anticipates a defense, and, without admitting its truth, replies to it affirmatively, and the defendant wishes to set up the defense by plea, it is obvious that he must traverse the anticipatory replication; for otherwise, in the event of issue being taken upon the truth of the plea, the affirmative replication will be admitted to be true. A negative rejoinder, therefore, must be incorporated with the affirmative plea. Such pleas have become common in modern times, and, being partly affirmative and partly negative, they are distinguished by the name of anomalous pleas. If the defendant should not be prepared to deny the truth of the affirmative replication, and should wish to set up an affirmative answer to it, of course both branches of his plea would be affirmative, but no instance of such a plea has been found in the reported cases. If an anomalous plea be put in issue, it will be seen that each party has something to prove, namely, the defendant his affirmative defense, and the plaintiff his affirmative replication; and the complainant is therefore entitled to discovery as to the latter. Consequently, an anomalous plea must always be supported by an answer as to the allegations which constitute the replication, and as to all charges of evidence, if any, in support of such allegations."

§ 302. [1] Langd. Eq. Pl. § 101.

[2] See Fost. Fed. Prac. § 137; Beach, Mod. Eq. Prac. § 298; Sims v. Lyle, 4 Wash. C. C. 301, Fed. Cas. No. 12,891; Foley v. Hill, 3 Mylne & C. 475. In Harrison v. Farrington, 38 N. J. Eq. 358, the bill anticipated a plea of an account stated, and alleged facts to avoid it. It was held that the answer, as well as the plea, must deny those allegations of the bill. A plea in bar of the statute of limitations is bad, unless accompanied by an answer, supporting it by a particular denial of all the facts and circumstances charged in the bill, and which in equity may avoid the statute. Goodrich v. Pendleton, 3 Johns. Ch. (N. Y.) 384; Chapin v. Coleman, 11 Pick. (Mass.) 331.

PLEAS OVERRULED BY ANSWER.

§ 303. Where a defendant, having interposed a defense by plea, also files an answer presenting the same or another defense, and covering the same ground as the plea, the answer will overrule the plea.[1]

The question as to when a plea would be overruled by an answer was formerly of great difficulty and importance, and produced much inconsistency and confusion in the case. When the plea did not require to be supported by an answer, but the plea and answer were to distinct parts of the bill, there was, of course, no difficulty. The real difficulty arose in connection with pleas supported by answers. The courts applied the rule with great strictness, and it became well-nigh impossible, except in the simplest cases, to draw a plea supported by answer which would not be overruled.[2] Moreover, the courts held that a plea might be overruled by an answer which gave discovery only, whereas "the rule had reference to defenses solely, and never had any application to that part of an answer which gives discovery merely."[3] Owing to these difficulties, pleas fell into disfavor, especially negative and anomalous pleas, and the objections taken by such pleas can now in most jurisdictions be taken by answer.[4]

It is provided by the thirty-seventh equity rule of the United States, and, in England, by the thirty-seventh order of August, 1841, that "no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may ex-

§ 303. [1] Harrison v. Farrington, 38 N. J. Eq. 358, 361.

[2] "The result of this extreme strictness was that sometimes, in cases to which a defense by plea and answer was strictly applicable, the bill might have been so framed as to render it practically impossible for the defendant to avail himself of such a form of pleading." Daniell, Ch. Pl. & Prac. 617, citing Denys v. Locock, 3 Mylne & C. 205, 238, 1 Jur. 605.

[3] Langd. Eq. Pl. § 103. "If the bill contains allegations, which, if uncontroverted, would invalidate the plea, these the defendant must answer; and, in the absence of authority to the contrary, it seems irresistibly to follow that a plea can never be hurt by discovery which relates exclusively to the matter of the plea itself." Wig. Disc. p. 152.

[4] U. S. Eq. Rule 39.

tend to some part of the same matter as may be covered by such demurrer or plea." Prof. Langdell says of the English order: "This order, as interpreted by the courts, simply restores the true rule, namely, that an answer, so far as it merely gives discovery, will not overrule a demurrer or plea; for it is still held that a demurrer or plea will be overruled by an answer setting up a defense to the same part of the bill which is covered by the demurrer or plea." [5]

ANSWERS IN SUBSIDIUM.

304. An answer in subsidium is an answer alleging facts in corroboration of the plea which have not been charged in the bill.

Answers in subsidium are not always distinguished from answers in support of pleas of the kind just considered. The former differs from the latter, however, in being an answer which the defendant is not obliged to put in for the purpose of avoiding the effect of any equitable ground which may be alleged in the bill for avoiding the bar offered by the plea.[1] "You may answer anything which is not charged in the bill, in subsidium of your plea, as you may deny notice in your answer, which you deny also in your plea, because that is not putting anything in issue which you would cover by your plea from being put in issue; but it is adding by way of answer that which will support your plea, and not an answer to a charge in the bill which by your plea you would decline." [2] Mr. Daniell says: "There are cases, however, in which, even though no equitable circumstances are alleged in the bill, to defeat the bar offered by plea, when, in fact, a pure plea may be pleaded, yet the defendant may support his plea by an answer, touching matters not

[5] Langd. Eq. Pl. p. 117, § 103, note 2. And see Beach, Mod. Eq. Prac. § 209; Dakin v. Railway Co., 5 Fed. 665; Crescent City Live-Stock, Landing & Slaughterhouse Co. v. Butchers' Union Live-Stock, Landing & Slaughterhouse Co., 12 Fed. 225; Grant v. Insurance Co., 121 U. S. 105, 7 Sup. Ct. 841. Where there is a plea to a bill in equity, and an answer in support of the plea, no question can be raised by the answer which is not raised by the plea. Andrews v. Brown (1849) 3 Cush. 130.

§ 304. [1] Daniell, Ch. Pl. & Prac. 625.

[2] Wig. Disc. p. 148.

charged in the bill.[3] * * * A defendant may also by this means put upon the record any fact which tends to corroborate his plea, so as to enable him afterwards to prove it."[4] Lord Redesdale says: "By such an answer nothing is put in issue covered by the plea from being put in issue, and the answer can only be used to support or disprove the plea."[5]

GROUNDS OF PLEAS.

305. Objections to bills which may be taken by pleas will be considered with reference to

(a) Original bills for relief (p. 449).

(b) Original bills not for relief (p. 479).

(c) Bills not original (p. 483).

PLEAS TO ORIGINAL BILLS FOR RELIEF.

306. Pleas to original bills for relief may be either

(a) To both the relief and the discovery (p. 449).

(b) To the relief alone (p. 452).

(c) To the discovery alone (p. 478).

SAME—PLEAS TO BOTH RELIEF AND DISCOVERY.

307. Any objection good to the relief will also be good to the discovery, provided

PROVISO—(a) The discovery is merely incidental to the relief sought; and

(b) The objection is pleaded to both relief and discovery; except

EXCEPTION—It is not good to the discovery required to be given in an answer in support of the plea.

It has been truly said that every bill for relief is in reality a bill for discovery also, since it demands from the defendant an

[3] Citing Beames, Pl. Eq. 37; Forbes v. Skelton, 8 Sim. 335, 345.

[4] Daniell, Ch. Pl. & Prac. 625. [5] Mitf. Eq. Pl. 299.

answer under oath as to all the matters charged in the bill.[1] But this discovery is merely incidental to the relief. The discovery to which complainant is entitled is limited to a discovery of evidence material to the support of plaintiff's case as stated in the bill. If, therefore, it is made apparent to the court that there exists a valid bar to the relief sought, it will not compel a discovery, for to do so would be useless, complainant having no case to be supported. "The rule is that where a bill prays discovery and relief, a demurrer [or plea], well taken as to the relief, holds good as to discovery also, provided the discovery is incidental to the relief," [2] and provided, further, that the objection is pleaded to both the relief and discovery.

As to the proviso that the discovery must be merely incidental to the relief sought by the bill, this seems to be the American rule. It was likewise the former English rule, but now it is the rule in England, without qualification, that a plea good to the relief is also good to the discovery, for a complainant is bound to shape his bill according to what he has a right to pray.[3] But in America, if the bill can be sustained as a bill of discovery, an objection good as to the relief sought is not necessarily good as to the discovery. A complainant is not to be prejudiced by having asked too much. "Where the discovery sought by a bill can only be assistant to the relief prayed, a ground of demurrer [or plea] to the relief will also extend to the discovery; but, if the discovery have a further purpose, the complainant may be entitled to it, though he has no title to the relief." [4] "'It would be unreasonable to refuse the aid to which he is in conscience entitled, because he asks something more.'[5] The question, then, is whether the complainants' bill be entitled to dis-

§§ 305–307. [1] Story, Eq. Pl. § 311.

[2] Souza v. Belcher, 3 Edw. Ch. (N. Y.) 117, 118; Hare, Disc. 6.

[3] "If a bill of discovery is filed manifestly in aid of a defense at law, and a prayer for equitable relief is added, the defendant is not bound to give any discovery beyond what is incidental to that relief; for, by mixing up the right to a discovery in aid of a defense at law with the equitable relief, he would get the discovery designed to aid the defense, without paying the costs in ordinary cases allowed upon a mere bill of discovery." Story, Eq. Pl. § 312, citing Desborough v. Curlewis, 3 Younge & C. Exch. 175, 178.

[4] Manning v. Drake, 1 Mich. 34.

[5] Jones v. Meredith, Comyn, 661, 668.

covery."[6] Where complainant is not entitled to the relief sought by his bill, it is clear that he is also not entitled to the discovery sought, unless the bill is good, considered as a bill for discovery merely. Accordingly, "when a bill in equity seeks relief which the court has no power to grant, and also seeks a discovery, the defendant may demur [or plead] to the whole bill, if it do not aver that a suit at law is pending, or is about to be brought, in which a discovery may be material."[7] The second proviso above mentioned, viz. that an objection good to the relief must be pleaded both to the relief and the discovery in order to bar the discovery, is the law both in England and America. It is well settled that, upon a bill for discovery and relief, the defendant may, if he chooses, answer and make the discovery sought, and at the same time demur or plead to the relief only;[8] and, if the defendant limits his plea to the relief only, he is bound to accompany his plea with an answer giving the discovery, or the plea will be overruled;[9] for, as has been seen, all parts of the bill must be met either by a demurrer, plea, or answer, and "if the defendant, on the face of his plea, pleads to the relief only, he professes that he will give the discovery."[10]

Exception—Discovery in Answer in Support of Plea.

It is obvious that, if the case is one where the plea must be supported by an answer giving discovery required for the trial of the plea, such plea, although good to the relief, is to that extent not good to the discovery. Accordingly the plea should be to all the relief and all the discovery sought by the part of the bill opposed, except so much of the discovery as must be given in an answer in support of the plea.[11]

[6] Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 294, 297.

[7] Mitchell v. Green, 10 Metc. (Mass.) 101. See, also, Pease v. Pease, 8 Metc. (Mass.) 395; Chapin v. Coleman, 11 Pick. (Mass.) 331, 337.

[8] Brownell v. Curtis, 10 Paige (N. Y.) 210, 213; Hodgkin v. Longden, 8 Ves. 3; Todd v. Gee, 17 Ves. 273.

[9] Story, Eq. Pl. § 312; King v. Heming, 9 Sim. 59.

[10] King v. Heming, 9 Sim. 59.

[11] In Lord Portarlington v. Soulby, 6 Sim. 356, defendant pleaded, to the whole bill, that he was a purchaser for valuable consideration, without notice, and, by answer in support of the plea, denied the charges of notice. It was held that the answer overruled the plea. The vice chancellor said: "The plea is wrong in point of form. It ought to have been a plea to all the relief and

Specific Grounds of Objection.

All objections good to both relief and discovery will be included in the class of objections good to the relief. Objections good only to the discovery, though they may consequentially affect the relief, do not necessarily do so, for non constat the complainant may be able to prove his case by other evidence. Accordingly, when objections which are good, considered solely with reference to the relief sought, have been discussed, objections good to both relief and discovery will have been sufficiently considered. Objections good to the discovery alone will be separately considered, thus completing the consideration of the grounds of pleas to original bills for relief.

SAME—PLEAS TO RELIEF ALONE.

308. Pleas to relief are generally classified, according to the grounds upon which they proceed, as

(a) Pleas to the jurisdiction of the court (p. 454).

(b) Pleas to the person of complainant or defendant (p. 456).

(c) Pleas to the bill (p. 460).

(d) Pleas in bar (p. 464).

309. The first three of the above classes present matters in abatement, and are often called "pleas in abatement."

At the present day, bills of discovery being practically obsolete or abolished, an objection good to the relief would be also good to the discovery, if pleaded to both, and it is seldom that it is not so pleaded. It is proper, however, to notice a distinction which is often made by the separation of pleas to the relief into two classes,—pleas in abatement and pleas in bar,—though the division is not as clearly recognized as at common law, and perhaps should not be.

Pleas in Abatement.

It has often been doubted whether any of the pleas in equity which are designated as declinatory or dilatory, as pleas to the ju-

to all the discovery sought by the bill, except certain parts, and to those parts there ought to have been an answer in support of the plea. You cannot plead and answer to the same matter."

risdiction, to the person, and to the bill, are properly pleas in abatement; but, while the term, well recognized in common-law phraseology, is not familiar in that of courts of equity, there seems no reason, upon principle, why it should not be equally and correctly used. The first three classes of pleas above mentioned are the same, in their nature and effect, as at common law, as, while questioning the propriety of the particular remedy or the suit, they tacitly concede the existence of a right to sue, and seek to delay, hinder, or dismiss the particular suit, without otherwise disputing such right. Resting upon similar grounds, they bear a close analogy to the dilatory or declinatory "exceptions" of the civil-law, and to the well-known pleas in abatement of the common-law, system. The matters which they present cannot be made the subject of an answer, and their use, if objection is to be taken, is obligatory, under the rule that matters in abatement must be pleaded in abatement, and not in bar.[1] It seems, therefore, that the distinction as to the nature of the matters which they present should be fully recognized, and that there is no doubt as to their substantial use in equity pleading, though the term "plea in abatement" is not always applied.[2]

Pleas in Bar.

Pleas of this class are more fully recognized in equity under the name given than the dilatory pleas just mentioned, and include all pleas which, instead of seeking to delay or dismiss the suit without questioning the right to sue, attempt to bar its further progress by disputing the right itself. A sufficient explanation of these has already been given in the explanation as to pure affirmative pleas.[3]

§§ 308–309. [1] Where the want of jurisdiction does not appear on the face of the bill, the objection to the jurisdiction can be raised only by plea. Parker v. Parker, 61 Ill. 369.

[2] See 1 Daniell, Ch. Pl. & Prac. (5th Am. Ed.) § 626; Story, Eq. Pl. § 705; Beames, Pl. Eq. 53, and notes; Newman v. Wallis, 2 Brown, Ch. 143; Gun v. Prior, 1 Cox, 197, 198.

[3] Ante, p. 433. See Story, Eq. Pl. § 706; Beames, Pl. Eq. 62.

310. PLEAS TO THE JURISDICTION—Pleas of this class are those that oppose the further continuance of the suit, upon the ground that the court has no jurisdiction to entertain it, either:

(a) Because the subject-matter of the bill is not within the jurisdiction of a court of equity; or

(b) Because some other court of equity is invested with the proper jurisdiction; or

(c) Because some other court possesses the proper jurisdiction.

The Classification in General.

In the classification of pleas to the jurisdiction adopted by Judge Story, an additional one is given, viz. that the subject-matter of the bill is not within the cognizance of any municipal court of justice,[1] but, as has already been mentioned in the chapter on demurrers,[2] pleas of this character seem to be properly included in the class first mentioned above, i. e. that the subject-matter of the bill is not within the jurisdiction of a court of equity. In any case, it does not seem to be adopted by later writers, and has been considered rather as a plea in bar than one to the jurisdiction.[3] The third class mentioned above has also been dropped by some authorities,[4] though it seems more properly retained, and an additional one given, viz. "that the defendant has not been properly served with process." [5]

When There is no Jurisdiction in Equity.

If the fact that the complainant's case is not one within the jurisdiction of any court of equity appears upon the face of the bill, objection must, of course, be taken by demurrer,[6] and it is most likely to thus appear, if it exists, as it would be difficult to so frame a

§ 310. [1] Story, Eq. Pl. § 710.

[2] Ante, c. 6, p. 387.

[3] See the remarks of Lord Thurlow in Nabob of Arcot v. East India Co., 3 Brown, Ch. 292.

[4] See Fost. Fed. Prac. § 126; and cases cited; 1 Beach, Mod. Eq. Prac. § 801.

[5] See Fost. Fed. Prac. § 126, and cases cited.

[6] Ante, c. 6, p. 387.

bill as to disguise it, if the facts are truly stated. A case is cited by Judge Story, however, where such a plea seems to have been recognized and sustained,[7] and it is not an unreasonable position that a plea should be available in order to save the delay and expense of an answer and a hearing, when otherwise the plaintiff might, by falsely stating facts showing a case of equitable jurisdiction, prevent the defendant from asserting a true defense at the proper time.

When Another Court of Equity Has Jurisdiction.

Although the subject of a suit may be within the jurisdiction of a court of equity, yet, if the court in which the suit is brought is not the proper jurisdiction, the defendant may present the objection by a plea showing that fact, as well as the court to which the jurisdiction belongs.[8] We have already seen that a demurrer may be taken on this ground, if the fact is apparent upon the face of the bill.[9] Under the limited jurisdiction of the federal courts, which requires a statement of all necessary jurisdictional facts upon the record, it would seem that the necessity for such a plea could hardly arise except in case of a false statement of the facts, such as the citizenship of the parties.[10] In such case the defendant, the jurisdiction attaching upon the face of the bill, would not be at liberty to put the citizenship in issue by a general answer, as that would admit the jurisdiction of the court to inquire into the merits of the suit, and puts the latter in issue.[11]

Where Another Court Has Jurisdiction.

That another court, not a court of equity jurisdiction, possesses jurisdiction over the controversy, may also be ground for a plea,

[7] Armitage v. Wadsworth, 1 Madd. 189. See, also, Dawson v. Pilling, 16 Sim. 203.

[8] Story, Eq. Pl. § 714.

[9] Ante, c. 6, p. 389.

[10] See ante, c. 6, p. 389, as to the cases suggested when a demurrer might be taken.

[11] See Dodge v. Perkins, 4 Mason, 435, Fed. Cas. No. 3,954; Livingston v. Story, 11 Pet. 351. A plea to the jurisdiction that one of the parties to the cause is a citizen of a state other than that alleged in the petition for removal need not be supported by an answer. McDonald v. Flour-Mills Co., 31 Fed. 577.

where such fact does not appear upon the face of the bill, and, under the latter condition, the instances already given as showing when a demurrer would lie may be referred to as sufficiently explanatory.[12]

311. PLEAS TO THE PERSON—Pleas to the person are those which, without disputing the validity of the rights in controversy, object to the ability of the complainant to sue, or the liability of the defendant to be sued. Pleas to the person are divided into two classes:

(a) Pleas to the person of the complainant (p. 456); **or**

(b) Pleas to the person of the defendant (p. 459).

Pleas to the person, whether of complainant or defendant, are those which oppose the bill upon one of the two grounds above mentioned, where such ground does not appear upon the face of the bill, as, if it thus appears, the remedy is a demurrer. The nature and effect of the objection made is, in substance, the same as in the demurrer, and in the plea in abatement on the same ground at common law, it being directed, not to the right to sue, but to the manner in which such right is asserted, either for the reason that the party advancing it is disabled from so doing, or that the defendant is not, for some legal reason, liable to respond.[1]

312. SAME—OF COMPLAINANT—A plea to the person of the complainant is one which objects to the maintenance of the suit by the complainant for one of two reasons, not apparent upon the face of the bill itself, viz.:

(a) That the complainant has not legal capacity to sue; or

(b) That he has no title to the character in which he sues.

[12] See ante, c. 6, p. 389.

§ 311. [1] See ante, c. 6, p. 390, and the explanation in regard to demurrers of this class.

Want of Capacity to Sue.

We have already noticed, in the chapter on parties, the cases where a person is incapacitated from suing in his own name;[1] and in that on the demurrer[2] have explained that, where it appears on the face of the bill that the plaintiff is under some legal disability which renders him incapable of suing in his own name in our courts, as where he is an infant, or of unsound mind, or in some states in the case of a married woman, and no one is named as the next friend by whose aid the suit must be brought, the bill is open to a demurrer. Where the fact of the disability exists, but the bill does not disclose it, objection may be made by plea; and it extends to the whole bill, and may be taken both to bills of discovery and for relief.[3] Pleas of this class are in the nature of pleas in abatement.[4]

Want of Title to the Character Assumed.

Pleas of this character, which assert, in effect, that the complainant is not the person he represents himself in his bill, or does not sustain the character which he there assumes, are, though negative in form, good pleas in abatement.[5] Thus, when one sued as administrator, a plea that he was not administrator was held good;[6] and, where one sued claiming as heir, a plea that he was not heir was good.[7] So, also, that a complainant suing as a partner is not such partner,[8] or as a creditor, that he is not such creditor, and that the defendant is not indebted to him.[9] Again, if an associa-

§ 312. [1] Ante, c. 2, p. 46. This defense must be taken by plea, and not by answer. Hoyt's Adm'r v. Hoyt, 58 Vt. 538, 3 Atl. 316.

[2] Ante, c. 6, p. 390.

[3] Ante, c. 6, p. 390. As instances of this plea under the earlier English practice, see Albretcht v. Sussmann, 2 Ves. & B. 323; Wartnaby v. Wartnaby, Jac. 378. And see Bowser v. Hughes, 1 Anstr. 101; Tarleton v. Hornby, 1 Younge & C. 172; Kirkman v. Andrews, 4 Beav. 554; Carleton v. Leighton, 3 Mer. 667.

[4] Story, Eq. Pl. § 722.

[5] Story, Eq. Pl. § 727; Beames, Pl. Eq. 120.

[6] Ord v. Huddleston, 2 Dick. 510.

[7] Drew v. Drew, 2 Ves. & B. 159; Newman v. Wallis, 2 Brown, Ch. 143, and note.

[8] Sanders v. King, 6 Madd. 61.

[9] Thring v. Edgar, 2 Sim. & S. 274.

tion of individuals sue in a corporate name without being incorporated, and the fact does not appear on the face of the bill, or a complainant, or one of several, is a fictitious person, or was dead at the commencement of the suit,[10] a plea showing these facts is good.

The principle of this plea, broadly stated, is the want of an interest by the complainant in the subject-matter, which, with a proper title to institute the suit, are, as we have already seen, essential to maintain the bill.[11] A title or interest apparently good may be stated in the bill, and yet be in fact unfounded, either by reason of misrepresentation by the complainant, or because he suppresses some fact which, if apparent, would show either that he never had such title or interest, or that it has been transferred to a third party, and this defect may be shown by plea.[12] It seems, however, that a plea on the ground of want of title would not often be necessary, as, if the bill does not state sufficient facts from which the court can infer a title in the complainant, the defendant may demur, the averment of title being not a fact, but a consequence. Thus, where a complainant stated an incumbrance on real estate devised to him, and averred that the charge was a debt of his testator, and prayed that it might be paid from the testator's personal estate, a plea that the testator had done no act by which he made it his own debt was overruled, whether it was his debt or not being a matter of inference from the facts stated, and the proper defense being by demurrer.[13]

If the case is one where, though the interest and right to sue exist, the complainant has still no right to call upon the defendant to answer his demands,—that is, where there is a want of privity between complainant and defendant,—a plea would probably be available if the bill was so drawn as to avoid a demurrer.[14]

[10] Coop. Eq. Pl. 249.

[11] Ante, c. 4, p. 193.

[12] Story, Eq. Pl. § 728.

[13] Mitf. Eq. Pl. 233. See, also, Stooke v. Vincent, 1 Colly. 527, where a defendant was allowed, in a case where the bill showed that the complainant had no interest, to plead a general release by him, the time for a demurrer having expired.

[14] Story, Eq. Pl. § 731. See ante, c. 4, p. 297, as to the relation that must exist to render the defendant liable.

313. SAME—OF DEFENDANT—Pleas to the person of the defendant oppose the bill on one of two grounds, not apparent upon its face, viz.:

(a) That the defendant does not sustain the character in which he is sued.

(b) That he has not such an interest in the subject-matter of the suit as to render him liable respecting it.

When Sued in a Wrong Character.

It is a good plea in abatement that a defendant is not the person he is alleged to be, or does not sustain the character in which he is sued; as if a defendant is sued as heir, or executor, or as an administrator, or a partner, it would be a good plea, in each case, that he does not sustain the character with which the bill clothes him.[1]

When not Liable, though Perhaps Interested.

If a defendant has not such an interest in the subject-matter of the suit as to render him liable to the demands of the complainant, and the bill, by alleging that defendant has or claims an interest, is made good against demurrer, he may plead the matter necessary to show that he has no interest, if the case is not such that he can dispose of his connection with the suit by a general disclaimer.[2] Thus, where a witness to a will was made defendant in a suit brought by the heir at law to discover the circumstances attending the execution of the will, and the bill contained a charge of an interest, a demurrer for want of interest was overruled, since it admitted the truth of the charge; but the court was of opinion that a plea would have been proper.[3]

§ 313. [1] Story, Eq. Pl. 732. See Sanders v. King, 6 Madd. 61; Drew v. Drew, 2 Ves. & B. 159; Langley v. Fisher, 10 Sim. 345.

[2] Story, Eq. Pl. § 734; post, c. 5, "Disclaimer."

[3] See Coop. Eq. Pl. 250; Plummer v. May, 1 Ves. Sr. 426.

314. PLEAS TO THE BILL—Pleas of this class are those which, while in general admitting the jurisdiction of the court, the complainant's ability to sue, and the defendant's liability to be sued, and the existence of a valid right or interest of the complainant in the subject-matter of the suit, oppose the bill, and further progress of the suit, for the reason:

(a) That there is another suit depending in a court of equity for the same matter and between substantially the same parties; or

(b) That there is a want of proper parties to the bill; or

(c) That to sustain the proceeding would cause a multiplicity of suits; or

(d) That the bill is multifarious, in joining or confounding distinct and separate matters in the same suit.

Pleas to the Bill in General.

Pleas of this character differ from pleas to the jurisdiction, as they do not dispute the original power of the court to take cognizance of the particular subject-matter, and in some instances tacitly admit it. They also differ from pleas to the person, since they admit both the complainant's right to sue and the defendant's liability to be sued, objecting to the suit as brought, or contending that it is unnecessary. And, finally, they differ from pleas in bar, in that they do not deny the validity of the right which is made the subject of the controversy, but contend that the right ought not to be canvassed on the existing record. They seem to bear a considerable resemblance to the common-law pleas in abatement to the action of the writ, such as another action pending, that the action itself is prematurely brought, or that it is misconceived.[1]

The different classes into which pleas to the bill are divided have been given above, but it seems that, except as to the first and third classes, the grounds of objection to the bill are most likely to be apparent on its face, when they would be the subject of a demurrer.

§ 314. [1] Story, Eq. Pl. § 735; Beames, Pl. Eq. 133. See Shipman, Com. Law Pl. § 51.

Pendency of Another Suit.

This plea, which is analogous to the common-law plea of another action pending, and, in most respects, governed by the same principles, is generally applicable to the case of another suit depending in the same or some other court of equity,[2] and it must, to afford a valid ground for objection, be between substantially the same parties, upon the same subject-matter, and the same, in its effect, as the suit in which the plea is interposed.[3] It is not necessary that the parties should be precisely the same, as, if one person institutes a suit, and afterwards sells part of the property affected to another, who files an original bill touching the part so purchased by him, and for the same relief as sought in the first instance, a plea of the former suit affecting the whole property will be good.[4] So, where one part owner of a ship filed a bill against the ship's husband for an accounting, and afterwards the same part owner and the rest of the owners filed a bill for the same purpose, the pendency of the first suit was held a good defense to the second, though the first was insufficient for want of parties.[5] The subject-matter involved in each suit, however, should not only be the same, but each should have the same effect and justify the same relief.[6]

[2] Story, Eq. Pl. § 736; Beames, Pl. Eq. 139. See Way v. Bragaw, 16 N. J. Eq. 213; Fulton v. Golden, 25 N. J. Eq. 353. And see Thorne v. Tanning Co., 15 Fed. 289, as to concurrent remedies, at law and in equity. This defense must be taken by plea, and not by answer. Battell v. Matot, 58 Vt. 271, 5 Atl. 479. A plea of a former suit pending in another court for the same cause of action must set forth the general character and objects of the former suit, and the relief prayed for. Bank of Michigan v. Williams, Har. (Mich.) 219.

[3] Story, Eq. Pl. §§ 738, 739; Estes v. Worthington, 30 Fed. 465.

[4] Beames, Pl. Eq. 139. See Estes v. Worthington, 30 Fed. 465.

[5] See, also, Massachusetts Mut. Life Ins. Co. v. Chicago & A. R. Co., 13 Fed. 857; Watson v. Jones, 13 Wall. 679; Dwight v. Railroad Co., 9 Fed. 785; Estes v. Worthington, 30 Fed. 465.

[6] See Law v. Rigby, 4 Brown, Ch. 60; Pickford v. Hunter, 5 Sim. 122; Way v. Bragan, 16 N. J. Eq. 213; Macey v. Childress, 2 Tenn. Ch. 23; Hertell v. Van Buren, 3 Edw. Ch. (N. Y.) 20; Watson v. Jones, 13 Wall. 679; Hurd v. Moiles, 28 Fed. 897. And these facts must substantially appear in the plea. Story, Eq. Pl. § 737, and cases cited. See McEwen v. Broadhead, 11 N. J. Eq. 131.

It is an established rule that a pending suit in a court of common law cannot be pleaded as a defense in equity, both for the reason that the complainant has the right to an oath of the defendant in equity to exonerate him from the burden of proof at law, and also because it can scarcely ever occur that the remedial justice and the grounds of relief are precisely the same in each court,[7] and, if the remedy is complete at law, that of itself would be a sufficient objection to the jurisdiction of a court of equity. The defendant is saved, however, from being annoyed by the double litigation, as a court of equity will, upon the coming in of his answer, compel the complainant to elect between the legal and the equitable suit.[8] But if the complainant fails in his suit at law, after exercising his election to follow that suit and after his bill in equity is dismissed, he may file a second bill.[9]

As the plea of another suit pending in equity is a good plea, if true, the usual course is to have the plea referred to a master to examine and report as to whether the two suits are the same.[10] If he reports that such is the fact, the plea is allowed, but, if otherwise, it is ipso facto overruled.[11] If the complainant, instead of procuring a reference to the master, sets the plea down for argument, it has been held that he admits its truth, and that it must then be allowed, unless defective in form.[12]

Want of Proper Parties.

Although a complainant may be fully entitled to the relief he prays, and the defendant has no sufficient claim to the protection of the court to prevent its interference, the defendant may still object to the bill if it is insufficient to answer the purposes of complete justice. This is usually for want of proper parties, and, if the defect is not shown on the face of the bill, he may plead the matter necessary to show it.[13] A plea of want of proper parties goes to

[7] Story, Eq. Pl. § 742.

[8] Beames, Pl. Eq. 146; Coop. Eq. Pl. 276.

[9] See Royle v. Wynne, 1 Craig & P. 252.

[10] Jones v. Segueira, 1 Phil. Ch. 82. See Wedderburn v. Wedderburn, 2 Beav. 208.

[11] Cooper, Eq. Pl. 275.

[12] Cooper, Eq. Pl. 275.

[13] Where the want of a necessary party does not appear on the face of the

both discovery and relief, where relief is prayed, although the want of proper parties is no objection to a bill for discovery merely.[14] Where a sufficient reason to excuse the defect is suggested in the bill, as where a personal representative is a necessary party, and the bill states that the representation is in contest in another court; or where the party resides outside the jurisdiction of the court, and the bill charges that fact; or where the bill seeks a discovery of the necessary parties,—an objection for want of parties will not, in general, be allowed, unless, perhaps, the defendant should controvert the excuse made by the bill, by pleading matter to show it false.[15]

A plea of this character should show who the proper parties are, by name, if practicable, and, if not so, by a description which will point out to the complainant the proper parties, thus enabling him to amend his bill.[16] This requirement is analogous to the common-law rule that the defendant in a plea in abatement must give the plaintiff a better writ.[17]

As to the efficacy of a plea for want of parties, if it is to the whole bill, it will be overruled if in any one state of facts charged by the bill the parties would be unnecessary, as the plea would not then be an answer to all the allegations of the bill;[18] and, on the other hand, the structure of the bill may sometimes prevent this objection being taken by way of plea, as if a bill, brought to compel the payment of an annuity charged on real estate, charges that the defendant ought to discover whether there are any incumbrances prior to the complainant's, and, if so, to set forth the names of the holders and the nature of their claims and priorities. A

bill, the objection can be taken only by plea or answer. Prentice v. Kimball, 19 Ill. 320. Followed by Conwell v. Watkins, 71 Ill. 488; Allen v. Woodruff, 96 Ill. 11.

[14] Story, Eq. Pl. § 610; Cholmondeley v. Clinton, 2 Mer. 74; Queen of Portugal v. Glyn, 7 Clark & F. 466.

[15] Beames, Pl. Eq. 148. See Robinson v. Smith, 3 Paige (N. Y.) 222; Mitchell v. Lenox, 2 Paige (N. Y.) 280, and note; Milligan v. Milledge, 3 Cranch, 220.

[16] Attorney General v. Jackson, 11 Ves. 365, 367; Merrewether v. Mellish, 13 Ves. 435; Cockburn v. Thompson, 16 Ves. 321, 325; Cook v. Mancius, 3 Johns. Ch. (N. Y.) 427.

[17] Shipman, Com. Law Pl. (2d Ed.) p. 494.

[18] Homan v. Shiel, 2 Jones, Ir. 164.

plea that there are prior incumbrancers who ought to be made parties would not be good, as the defendant is bound to make the discovery as prayed for.[19]

Multiplicity of Suits.

As courts of equity discourage the promotion of unreasonable litigation, they will not permit a bill to be brought for a part of a matter only, where the whole controversy should be determined in one suit, and the objection may be taken by plea.[20] This is really the main ground of the objection for want of proper parties, the tendency of such an omission being to multiply litigation.[21]

Multifariousness.

The plea of multifariousness asserts, as a defense, that the bill improperly joins and confounds separate and distinct matters in one suit; but it seems that it can seldom be available, as the objection is generally apparent upon the face of the bill, and should then be taken by demurrer. It is therefore sufficient here to refer to the consideration of this objection in connection with the demurrer,[22] as in the cases there mentioned, if the objection is not plainly disclosed by the bill, a plea would be available. Such a plea, properly considered, would be neither to the jurisdiction, nor to the person, nor in bar, but strictly a plea to the bill or its frame.[23]

315. PLEAS IN BAR—A plea in bar is one that opposes the bill by presenting matter of fact which, if true, is a complete bar to the suit on its merits.

316. According to the nature of the different defenses which they present, pleas of this class are usually divided into:

(a) Pleas founded on some bar created by statute (p. 465).

[19] Rawlings v. Dalton, 3 Younge & C. Exch. 447.

[20] Beames, Pl. Eq. 155; Coop. Eq. Pl. 184.

[21] Both this and the plea of want of proper parties have been classed by a high authority as pleas in bar; but it seems to be rather a plea in abatement, since it does not dispute the existence of the right to sue, nor assert, in effect, that such right, though once existing, has been extinguished.

[22] Ante, c. 6, p. 393.

[23] Beames, Pl. Eq. 157; Benson v. Hadfield, 4 Hare, 32.

(b) **Pleas founded on matter of record** (p. 468).

(c) **Pleas of matter in pais; that is, matter of fact not of record** (p. 472).

317. Their object is to oppose the substantial merits of the suit without making a full answer, and, if sustained, their effect is to destroy the right upon which the suit is founded.

318. SAME—BAR CREATED BY STATUTE—Pleas of the first class above mentioned are those which rely upon one of the following defenses:

(a) The statute of limitations.

(b) The statute of frauds.

(c) Any other statute creating a bar.

Statute of Limitations.

This statute is a good bar to a suit in equity as well as to an action at law, and will ordinarily bar both the claim for relief and the discovery, in an action to recover a debt.[1] Thus, in case of a bill which seeks the recovery of a debt, if it is a fact, not apparent upon the face of the bill, that the debt accrued more than six years before the commencement of the suit, a plea would be proper;[2] and so in any case where the bill does not show the existence of this objection, though an answer is also available.[3] The statute, moreover, cannot be taken advantage of in equity unless pleaded, or otherwise relied on as a defense,[4] and, if a defense to a part

§§ 315–318. [1] See James v. Sadgrove, 1 Sim. & S. 4; Macgregor v. East India Co., 2 Sim. 455; Sutton v. Scarborough, 9 Ves. 71; Dexter v. Arnold, 3 Sumn. 152, Fed. Cas. No. 3,859.

[2] Story, Eq. Pl. § 751.

[3] Van Hook v. Whitlock, 7 Paige (N. Y.) 373; Conover v. Wright, 6 N. J. Eq. 613. Under supreme court equity rule, January 15, 1894, providing that all defenses in equity cases shall be made by answer or demurrer, and all issues of fact must be made by answer, a plea of the statute of limitations in an equity case will be dismissed and the case remanded for hearing on bill and answer. Moore v. Bush (Com. Pl.) 17 Pa. Co. Ct. R. 252, 5 Pa. Dist. R. 141.

[4] Hickman v. Stout, 2 Leigh (Va.) 6. See, also, Colvert v. Millstead's Adm'x, 5 Leigh (Va.) 88; Humphreys v. Butler, 51 Ark. 351, 11 S. W. 479.

only of the complainant's demand, it cannot be pleaded to the whole;[5] but in framing his plea the defendant need not set up the statute in a formal manner, it being sufficient to state the facts which bring the case within its operation and which are relied on as a defense, claiming a bar by reason of such facts,[6] nor need he specially set up the statute of a state in which the suit is brought.[7]

If the bill, as in the cases we have considered, states nothing which is to be construed as a ground for the application of the statute, the plea asserting this defense will be a pure plea, and needs no support in its opposition to the bill.[8] But if, on the contrary, the bill states facts showing a lapse of the time apparently within the purview of the statute, and seeks to avoid their effect by the allegation of additional facts which would take the case out of the statute, such as fraud, mistake, a new promise within six years, or any case of disability constituting an exception to its operation, the plea will be an anomalous plea, and must not only assert the statutory defense relied on, but must expressly negative the averments of the bill thus made in avoidance of the bar,[9] and must be supported by an answer denying and answering the averments thus made.[10]

Laches in the Absence of the Statute.

We have already seen that the unreasonable neglect or delay of a plaintiff to assert his rights by suit, where no statute of lim-

[5] Wood v. Riker's Ex'rs, 1 Paige (N. Y.) 616.

[6] See Van Hook v. Whitlock, 7 Paige (N. Y.) 373.

[7] Harpending v. Reformed Church, 16 Pet. 455.

[8] Story, Eq. Pl. § 754. See, also, Thring v. Edgar, 2 Sim. & S. 274; MacGregor v. East India Co., 2 Sim. 452.

[9] McCloskey v. Barr, 38 Fed. 165.

[10] South Sea Co. v. Wymondsell, 3 P. Wms. 143; Hovenden v. Annesley, 2 Schoales & L. 607, 635; Goodrich v. Pendleton, 3 Johns. Ch. (N. Y.) 384; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90, 134. See, also, Bayley v. Adams, 6 Ves. 586; Cork v. Wilcock, 5 Madd. 328; James v. Sadgrove, 1 Sim. & S. 4; Didier v. Davison, 2 Sandf. Ch. (N. Y.) 61. In such a case, the plea must not be directed to the whole bill, or it will include the discovery to which the supporting answer must be made, and will be overruled. Lord Portarlington v. Soulby, 6 Sim. 356; Bolton v. Gardner, 3 Paige (N. Y.) 273. As to when the plea will be good in bar of an account, see Spring v. Gray, 5 Mason, 505, 522, Fed. Cas. No. 13,259. As to the time within which this plea may be allowed, see Webb v. Fuller, 83 Me. 405, 22 Atl. 384.

itations applies, may be a ground for demurrer when the fact of such laches plainly appears on the face of the bill.[11] Where the fact exists, but it does not so appear, the defense of laches may be advanced by plea.[12] The cases already noticed in the explanation of the demurrer on this ground will sufficiently illustrate the propriety of this defense, as a plea would in all such cases probably be available if the facts of the delay are not disclosed by the bill.[13]

Statute of Frauds.

The statute of frauds may also be pleaded in bar of any suit to which its provisions apply, where the application is not clearly shown by the facts stated in the bill,[14] in which case it may be taken by demurrer. Thus, where a bill stated a parol agreement for the sale of lands, and the payment of a part of the purchase price, which was insufficient to take the case out of the statute, a plea of the statute was held good;[15] and, where a bill seeks the specific performance of a contract or agreement respecting lands, the defendant may plead the statute, and negative the fact of there being any contract or agreement good within its provisions.[16]

A distinction has been taken, however, between cases where the bill alleges the agreement generally, without stating whether it is in writing, in which case a plea is the proper method, and where it shows that the agreement is in writing, when it has been considered that a plea would amount to no more than so much of an answer and the latter should be used.[17] But it seems that a negative plea would be good.

This plea may extend to both discovery and relief,[18] but, as has been already stated as to a similar plea, if the bill charges facts,

[11] Ante, c. 6, p. 397.

[12] Story, Eq. Pl. §§ 756–759, and cases cited. See, also, Edison Electric Light Co. v. Equitable Life Assur. Soc. of U. S., 55 Fed. 478.

[13] See ante, c. 6, p. 397, and cases cited.

[14] Story, Eq. Pl. § 761; Cottington v. Fletcher, 2 Atk. 156; Tarleton v. Vietes, 1 Gilman (Ill.) 470.

[15] Main v. Melbourn, 4 Ves. 720. See Black v. Black, 15 Ga. 445.

[16] Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425.

[17] Morison v. Turnour, 18 Ves. 175, 182. See Whitchurch v. Bevis, 2 Brown, Ch. 433, 566; Thring v. Edgar, 2 Sim. & S. 274; Rowe v. Teed, 15 Ves. 378. See, also, Lincoln v. Wright, 5 Jur. (N. S.) 1142.

[18] Story, Eq. Pl. § 763.

such as part performance, to avoid the bar of the statute, it must be supported by an answer, and both must deny such facts.[19]

Other Public or Private Statutes.

Any statute, public or private, creating a good bar to the demand of the plaintiff, may be pleaded with the averments necessary to bring the case within the statute, and to avoid any equity set up by the bill against the bar thus created.[20] In the latter case there must also be an answer, as in the cases we have just considered.

319. SAME—BAR CREATED BY MATTER OF RECORD —Pleas of this kind are those which oppose the bill upon one of the following grounds:

(a) A judgment at law in a court of record.

(b) The judgment or decree of a foreign court.

(c) A decree of a court of equity.

320. A judgment or decree, to be available as a bar, must in general have been a final determination upon the merits of a suit or controversy involving the same cause of action, having the same object, and between substantially the same parties, as the suit to which it is pleaded as a defense.

Requisites to Create the Bar.

Before noticing the different classes of estoppels by record, it should be mentioned that certain conditions must exist, whether the judgment relied on is at law or in equity, domestic or foreign. In the first place, the parties must have been substantially the same as in the present suit, though not precisely;[1] second, the

[19] Story, Eq. Pl. § 764. See Whitchurch v. Bevis, 2 Brown, Ch. 559, and note; Coop. Eq. Pl. 256, 257; Adlington v. Cann, 3 Atk. 141; Chamberlain v. Agar, 2 Ves. & B. 259.

[20] Such as the statute against usury. See Atlantic, T. & O. R. Co. v. Carolina Nat. Bank, 19 Wall. 548, 560. As to what such a plea, or an answer setting up the same defense, must contain, see New Orleans Gaslight & Banking Co. v. Dudley, 8 Paige (N. Y.) 452; Crane v. Insurance Co., 27 N. J. Eq. 484; Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47.

§§ 319-320. [1] Mitf. Eq. Pl. (Jeremy's Ed.) § 248. See, also, Matthews v.

judgment must amount to a final determination of the cause on its merits;[2] and, finally, the subject-matter of the two suits must be the same,—that is, the same subject-matter must be involved, and the object of each proceeding be substantially the same.[3] A decree dismissing a bill for reasons not involving the merits is no bar to a subsequent suit involving the same subject-matter.[4]

Judgments at Law.

If the judgment of a court of ordinary jurisdiction, in an action involving the same subject-matter, and between substantially the same parties, has finally decided their rights, such judgment may, in general, be pleaded in bar of a bill in equity.[5] Thus, where a bill was brought by a person claiming to be the son and heir of Jocelin, earl of Leicester, and alleged that the earl, being tenant in tail of estates, had suffered a recovery, and had declared the use to himself and a trustee in fee, and that the plaintiff had brought a writ of right to recover the lands, but that the defendant had possession of the title deeds, and intended to set up the legal estate which was vested in the trustee, the defendant pleaded, as to the discovery of the deeds and relief, a judgment in his favor on a writ of right, and averred that the title in the trustee, whom the bill sought to have removed, had not been given in evidence, the plea was allowed.[6]

Foreign Judgments.

The sentence or judgment of a foreign court upon the same matter put in controversy by the bill, and between the same parties, may be pleaded in bar in a court of equity, and will be a good bar if the foreign court, in pronouncing judgment, had full juris-

Roberts, 2 N. J. Eq. 338; Taylor v. Cornelius, 60 Pa. St. 187; ante, p. 461; Huggins v. Building Co., 2 Atk. 44.

[2] Ante, p. 461; Hughes v. U. S., 4 Wall. 232. See, also, Haws v. Tiernan, 53 Pa. St. 192; Keller v. Stolzenbach, 20 Fed. 47.

[3] Ante, p. 461. See Behrens v. Pauli, 1 Keen, 456; Behrens v. Sieveking, 2 Mylne & C. 602.

[4] Hughes v. U. S., 4 Wall. 232; Rosse v. Rust, 4 Johns. (N. Y.) 300. A judgment dismissing a suit "agreed" is a bar to any other action for the same cause. Bank of Commonwealth v. Hopkins, 2 Dana (Ky.) 395.

[5] Story, Eq. Pl. § 780.

[6] Story, Eq. Pl. p. 645. And see Behrens v. Pauli, 1 Keen, 456; Behrens v. Sieveking, 2 Mylne & C. 602.

diction over the subject-matter, subject to exceptions, such as fraud, mistake, or surprise, which would invalidate a domestic judgment.[7] And this rule applies as well to judgments rendered in states other than that in which the present suit is pending [8] as to those of foreign countries; the different states of the Union being, for most legal purposes, foreign to each other.[9]

Decrees in Equity.

A decree in equity, either of the same or another court of equity,[10] may be pleaded as a bar to a new bill brought upon the same cause of action and for the same object, and between substantially the same parties,[11] where such decree has also been signed and enrolled,[12] and is either final in its nature, or has been made so by a judicial order.[13]

The requirements as to subject-matter, parties, and effect, as a final determination of the first suit upon its merits, are substantially the same as in pleading a judgment of a court of common law;[14] but the signing and enrollment are peculiar to equity pro-

[7] Story, Eq. Pl. § 783. See Ricardo v. Garcias, 12 Clark & F. 368; Bowles v. Orr, 1 Younge & C. Exch. 464; Henderson v. Henderson, 3 Hare, 100; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460; Cincinnati, U. & F. W. R. Co. v. Wynne, 14 Ind. 385; Bradstreet v. Insurance Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Magoun v. Insurance Co., 1 Story, 157, Fed. Cas. No. 8,961.

[8] Bank of North America v. Wheeler, 28 Conn. 433; Barnes v. Gibbs, 31 N. J. Law, 317; McGilvray v. Avery, 30 Vt. 538; Brown v. Railroad Co., 13 N. J. Eq. 191.

[9] See Dorsey v. Maury, 10 Smedes & M. (Miss.) 298.

[10] Beames, Pl. Eq. 205. See Bank of England v. Morice, 2 Brown, Parl. Cas. 465. If a bill seeks the enforcement of a trust, and of the rights springing therefrom, a plea in bar to so much of the bill as asks for such enforcement, setting up a prior adjudication against the complainant, is good. Oyster v. Oyster, 28 Fed. 909.

[11] Mallock v. Galton, 1 Dickens, 65; Reeve v. Dalby, 2 Sim. & S. 464; Pickford v. Hunter, 5 Sim. 122; Hayward v. Constable, 2 Younge & C. Exch. 43; Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1.

[12] Story, Eq. Pl. § 790; Kinsey v. Kinsey, 2 Ves. Sr. 577; Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199.

[13] Mitf. Eq. Pl. (Jeremy's Ed.) 237. See Moss v. Ashbrooks, 12 Ark. 369; Hotchkiss v. Nichols, 3 Day (Conn.) 138; Baldwin v. McCrea, 38 Ga. 650; Hall v. Dodge, 38 N. H. 346.

[14] Ante, p. 469. It must be an absolute decision upon the same point or matter, and the new bill must be brought by the same complainant who filed

cedure, and the rule is, though without any very good reason save that of custom, that until so signed and enrolled it cannot be pleaded directly in bar,[15] though it may be insisted on by way of answer.[16] Moreover, unless the decree is in its nature final, or has been made so by an order of court, when necessary, it cannot be pleaded in bar.[17] Thus, a decree for an account of principal and interest due on a mortgage, and for a foreclosure in case of nonpayment, cannot be pleaded to a bill to redeem, unless there is a final order of foreclosure.[18] An order or decree dismissing a former suit for the same matter may be pleaded in bar to a new bill, when the merits have been heard, and the dismissal is not "without prejudice," [19] but an order of dismissal is final only when the court determines that the complainant has no title to the relief sought.[20]

the original bill, or his representatives against the same defendant or his representatives. If the defendant in the original suit, having since acquired a legal estate or legal advantage, files a bill against the former complainant, the cause is open on its merits. Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1. A plea of a former adjudication in chancery should specify the issue and the equities decreed upon, and not a mere legal conclusion. Riley v. Lyons, 11 Heisk. (Tenn.) 246.

[15] Mallock v. Galton, 1 Dickens, 65; Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199.

[16] Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199; White v. Bank of United States, 6 Ohio, 528. It seems, however, that it may, though not enrolled, be pleaded to show that the bill is exhibited contrary to the usual practice of the court, and ought not to be proceeded upon. Kinsey v. Kinsey, 2 Ves. Sr. 577.

[17] See Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1.

[18] Senhouse v. Earl, 2 Ves. Sr. 450. See, also, Perine v. Dunn, 4 Johns. Ch. (N. Y.) 140.

[19] Perine v. Dunn, 4 Johns. Ch. (N. Y.) 142. See, also, Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1; Jenkins v. Eldredge, 3 Story, 299, Fed. Cas. No. 7,267; Davis v. Hall, 4 Jones, Eq. (N. C.) 403. As to when the dismissal is not a bar, see Brandlyn v. Ord, 1 Atk. 571; Smith v. McNeal, 109 U. S. 426, 3 Sup. Ct. 319; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99; Pendleton v. Dalton, 92 N. C. 185; Steam-Gauge & Lantern Co. v. Meyrose, 27 Fed. 213. See, also, Keller v. Stolzenbach, 20 Fed. 47; Tilton v. Barrell, 17 Fed. 59.

[20] A dismissal for want of prosecution would therefore be no bar. Brandlyn v. Ord, 1 Atk. 571. See Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99. And a decree must be conclusive of the rights of the complainant in the former bill, or of those under whom he claims. See Doyley v.

If a bill is brought to impeach a decree on the ground of fraud used in obtaining it, the decree may be pleaded in bar; but the plea must contain averments negativing the charge of fraud, and be supported by an answer also denying it.[21]

321. SAME—BAR CREATED BY MATTER IN PAIS—Pleas of matter in pais are those which oppose the bill upon one of the following grounds.

(a) A release.
(b) A stated account.
(c) A settled account.
(d) An award.
(e) That the defendant is a purchaser for a valuable consideration.
(f) Title in the defendant.

Plea of Release.

If the complainant, or any person under whom he claims, has released the subject of his demand, the release may be pleaded as a defense;[1] and in such case the plea must set out the consideration upon which the release was made, but will not, however, extend to a discovery of the consideration.[2] If fraud, surprise, inadequacy of consideration, or any other fact, is alleged in the bill in avoidance of the release, the plea must meet and negative these charges by proper averments in its statement of defense, and be supported by an answer also denying them,[3] as in the case of other

Smith, 2 Cas. Ch. 119; Godfrey v. Chadwell, 2 Vern. 601; Atkinson v. Turner, Barnard, 74.

[21] Wichalse v. Short, 3 Brown, Parl. Cas. 558. See Meadows v. Duchess of Kingston, 2 Amb. 756; Allen v. Randolph, 4 Johns. Ch. (N. Y.) 693; McMullen v. Richie, 41 Fed. 502; Hilton v. Guyott, 42 Fed. 249; ante, p. 438.

§ 321. [1] Story, Eq. Pl. § 796. See Pusey v. Desbouvrie, 3 P. Wms. 315; Phelps v. Sproule, 1 Mylne & K. 231; Roche v. Morgell, 2 Schoales & L. 721; Sanders v. King, 6 Madd. 61; Bolton v. Gardner, 3 Paige (N. Y.) 273; Allen v. Randolph, 4 Johns. Ch. (N. Y.) 693.

[2] Copon v. Miles, 13 Price, 767; Roche v. Morgell, 2 Schoales & L. 721. And see Bolton v. Gardner, 3 Paige (N. Y.) 273; Fish v. Miller, 5 Paige (N. Y.) 26.

[3] Coop. Eq. Pl. 271; ante, pp. 438, 439.

anomalous pleas.[4] Thus, to illustrate, a plea of release to a bill for an account should contain an averment that an account has been rendered and payment made, where those facts are denied in the bill, though the release itself recites an account and payment;[5] and, on a bill to set aside a release for fraud in procuring it, a plea of the release must be supported by an answer denying directly and issuably the circumstances of fraud charged.[6]

Pleas of Stated and Settled Accounts.

These two classes of pleas may be considered together, as they depend, for the most part, upon the same considerations. A stated account is an agreement between the parties to an account that all the items are true,[7] and properly exists only where accounts have been examined, and the balance thus admitted, but not paid.[8] A settled account is when the balance thus admitted has been paid.[9] Each of these defenses may be interposed by plea in bar of a bill for an accounting, but the defendant who pleads a stated account must show that it was in writing, or, at least, what the balance was as agreed upon, and that the settlement was final.[10] A verbal statement of account, and a receipt in full given on a balance there agreed to be due, have been held bad as a plea in bar, where mistakes are shown to have occurred,[11] and even a receipt in full of all demands will be no bar, if there are suspicious circumstances attending it.[12]

A settled account, agreed upon and signed, will not be opened in equity, unless for fraud or error, distinctly specified in the bill,

[4] Ante, p. 445.

[5] Fish v. Miller, 5 Paige (N. Y.) 26.

[6] Bolton v. Gardner, 3 Paige (N. Y.) 273.

[7] See Stebbins v. Niles, 25 Miss. 267.

[8] Story, Eq. Pl. § 798.

[9] 1 Story, Eq. Jur. § 526. See Eudo v. Caleham, Younge, 306; Copon v. Miles, 13 Price, 767; Weed v. Smull, 7 Paige (N. Y.) 573.

[10] See Harrison v. Farrington, 38 N. J. Eq. 358. A plea of an account stated must aver that the settlement was of all dealings between the parties; that the accounts were just, fair, and due; and these averments must be supported by an answer to the same effect. Schwarz v. Wendell, Har. Ch. 395.

[11] Story, Eq. Pl. § 798, citing Phelps v. Sproule, 1 Mylne & K. 231.

[12] Story, Eq. Pl. § 799.

and supported by evidence;[13] but, where fraud has appeared in a stated account, it has been opened after a considerable lapse of time.[14]

If the plea presenting either of the defenses named is opposed to a bill charging error or fraud, these charges must be met and denied by proper averments in the plea, and also in the supporting answer which must accompany it;[15] and, if neither of these charges are made, the plea must aver that the stated or settled account is just and true, to the best of the defendant's knowledge and belief.[16]

Plea of an Award.

An award, when actually made, may be pleaded to a bill to set it aside and open the account, and extends, in such case, both to the merits of the case and the discovery sought,[17] unless fraud or partiality are charged against the arbitrators, or some other facts as a ground for impeaching the award, when the plea must deny these, and be supported by an answer also denying them.[18]

An agreement for a submission of all matters in dispute to arbitrators, however, cannot be pleaded in bar to a bill brought respecting such matters, no award having been made; and in any case, in order that such a contract should be specifically performed, or should bar a suit, the parties must have agreed upon the arbitrators, the questions to be submitted to them, and the purpose of the submission, and that all the subjects of difference, whether ascertained or not, be fit subjects for the determination of arbitrators.[19]

Plea of Purchaser for Valuable Consideration.

It is an established rule of equity jurisprudence that one who purchases property from another, in good faith, for a valuable con-

[13] Story, Eq. Pl. § 800. See Greene v. Harris, 11 R. I. 5.

[14] Story, Eq. Pl. § 801.

[15] Beames, Pl. Eq. 222; Phelps v. Sproule, 1 Mylne & K. 231; Greene v. Harris, 11 R. I. 5.

[16] See the authorities last cited.

[17] Story, Eq. Pl. § 803; 2 Story, Eq. Jur. § 1458.

[18] Evans v. Harris, 2 Ves. & B. 364; Dryden v. Robinson, 2 Sim. & S. 529.

[19] Story, Eq. Pl. § 804.

sideration actually paid in consummation of the purchase, and without notice of the rights of a third party, can maintain his title to such property as against such party, on the principle that, although the latter may have a ground for relief, yet, as the purchaser in such case has an equal right to the protection of the court, equity will not interfere.[20] This defense, therefore, can be pleaded in bar of a suit, as where, to a bill in equity seeking the recovery of certain property, a defendant pleads a bona fide purchase of such property without notice of the complainant's rights, and an actual payment of the consideration for the same,[21] and this defense will protect him against discovery as well as against the relief sought by the bill.[22] All persons claiming under a marriage settlement stand in the same position,[23] and a person who purchases with notice of the complainant's claim, from one who had not such notice, may shelter himself under the protection afforded the latter.[24]

In the assertion of this defense the plea must aver every fact, the existence of which is necessary under the principles applicable; as that the person who conveyed to the defendant was seised in fee or pretended to be so seised, and, a transfer of possession being in-

[20] Story, Eq. Jur. §§ 64c, 630, note 5, 1502, 1503; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847. As to judgment creditors, see Langton v. Horton, 1 Hare, 549; Skeeles v. Shearly, 8 Sim. 153; Newlands v. Paynter, 4 Mylne & C. 408. This defense has been held to afford protection to the holder of an equitable title under certain circumstances, as against a legal title. See Wallwyn v. Lee, 9 Ves. 24a; Joyce v. De Moleyns, 2 Jones & L. 374; Payne v. Compton, 2 Younge & C. Exch. 457; Boone v. Chiles, 10 Pet. 177.

[21] See Story, Eq. Pl. §§ 805–808; Payne v. Compton, 2 Younge & C. Exch. 457; Bassett v. Nosworthy, Finch, 102, and the English and American notes to this case in 2 White & T. Lead. Cas. Eq. pp. 31, 52, et seq.: Story, Eq. Jur. (11th Ed.) §§ 1502, 1503; Snelgrove v. Snelgrove, 4 Desaus, (S. C.) 274, 284; Judson v. Corcoran, 17 How. 612; Baylcy v. Greenleaf, 7 Wheat. 46.

[22] Story, Eq. Pl. § 825; Perrat v. Ballard, 2 Ch. Cas. 72.

[23] Harding v. Hardrett, Finch, 9. See, also, Lord Keeper v. Wyld, 1 Vern. 139.

[24] Varick v. Briggs, 6 Paige (N. Y.) 323, 329; Jackson v. McChesney, 7 Cow. (N. Y.) 360; Boone v. Chiles, 10 Pet. 177; Halstead v. Bank, 4 J. J. Marsh. (Ky.) 554. And see Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 147.

cident to such conveyance, that he was in possession.[25] It must also set forth the conveyance as actual,[26] as well as an actual and valuable consideration actually paid;[27] and must deny notice previous to the purchase relied on, of the complainant's title or claim, or of any circumstances of fraud charged in the bill.[28] The denial of notice thus made will be general in form, and covers both actual and constructive notice, but the circumstances of fraud must be denied as specially and particularly as charged in the bill.[29]

The same rule will apply, as to a supporting answer, as we have already noticed.[30]

Plea of Title in Defendant.

From what has been already said, the plea of a purchase for a valuable consideration without notice cannot be set up as a defense by a party who claims under a mere voluntary conveyance or other voluntary title. But a mere volunteer may, however, plead his title against a bill brought against him; for if his title be, on the whole, paramount to that of the complainant, there seems no reason why it should not be an effectual bar to an adverse suit. This plea of title in the defendant is generally founded (1) on a

[25] Story v. Lord Windsor, 2 Atk. 630; Head v. Egerton, 3 P. Wms. 280; Trevanian v. Mosse, 1 Vern. 246; Snelgrove v. Snelgrove, 4 Desaus. (S. C.) 274, 287. See, also, Wallwyn v. Lee, 9 Ves. 24.

[26] Story v. Lord Windsor, 2 Atk. 630.

[27] Wagstaff v. Reade, 2 Ch. Cas. 156; Wood v. Mann, 1 Sumn. 506, Fed. Cas. No. 17,951; Boone v. Chiles, 10 Pet. 177. It will not be sufficient to show that the payment of the consideration has been secured, Hardingham v. Nicholls, 3 Atk. 304; Snelgrove v. Snelgrove, 4 Dessaus. (S. C.) 274, 287; and the consideration, if shown to be valuable, need not be alleged as adequate, Bullock v. Sadlier, 2 Amb. 764; Snelgrove v. Snelgrove, 4 Desaus. (S. C.) 274. And see Wagstaff v. Reade, 2 Ch. Cas. 156.

[28] Jones v. Thomas, 3 P. Wms. 243; Story v. Lord Windsor, 2 Atk. 630. And see Bullock v. Sadlier, 2 Amb. 763.

[29] See Pennington v. Beechey, 2 Sim. & S. 282; Cork v. Wilcock, 5 Madd 328; Thring v. Edgar, 2 Sim. & S. 274.

[30] Ante, pp. 444, 445, where the application of the rule as to other pleas is explained, and pages 438, 439, where the general rule is noticed. See, also, Pennington v. Beechey, 2 Sim. & S. 282; Price v. Price, 1 Vern. 185; Hardman v. Ellames, 5 Sim. 640, 650; Hilton v. Guyott, 42 Fed. 249.

will; or (2) on a conveyance; or (3) on long, peaceable, and adverse possession.[31]

In the first case, where a bill was brought by an heir at law to dispossess a devisee, the latter may plead his title under the will.[32] In the second case, a conveyance by an ancestor may be pleaded in bar to a bill by the heir against the grantee in such conveyance,[33] or a plea of title paramount, under a former conveyance, may be set up against a bill to set aside a deed on the ground of fraud.[34] The third instance mentioned is a defense peculiar to equity, analogous to that afforded by the statute of limitations, but not within its reach.[35] A suitor guilty of unreasonable delay must excuse himself before he can expect the aid of equity, and courts of equity have established the doctrine that after a great lapse of time, and long peaceable possession, they ought not to interfere to grant relief, the policy of the law being to quiet title.[36] In case of a great lapse of time, a presumption will even be raised, if the circumstances will warrant it, that the adverse title has been extinguished.[37] Thus, where a bill was filed to compel the payment of a rent charge, 26 years' possession of the premises, without accounting for or paying over any of the rents and profits, was held a sufficient bar.[38]

[31] Story, Eq. Pl. § 811.

[32] Beames, Pl. Eq. 248.

[33] Beames, Pl. Eq. 249.

[34] Howe v. Duppa, 1 Ves. & B. 511.

[35] See Smith v. Clay, 2 Amb. 645; Hovenden v. Lord Annesley, 2 Schoales & L. 607; Beckford v. Wade, 17 Ves. 87a, 96; Cholmondeley v. Clinton, 2 Jac. & W. 1; Hughes v. Edwards, 9 Wheat. 489; Elmendorf v. Taylor, 10 Wheat. 152, 168; McKnight v. Taylor, 1 How. 161; Gould v. Gould, 3 Story, 516, 537, Fed. Cas. No. 5,637.

[36] Cholmondeley v. Clinton, 2 Jac. & W. 1, 163–175, and the cases cited in the last preceding note.

[37] Cholmondeley v. Clinton, supra.

[38] Baldwin v. Peach, 1 Younge & C. Exch. 453. See, also, ante, c. 4, p. 258; Crook v. Glenn, 30 Md. 55; Cheever v. Perley, 11 Allen (Mass.) 584; Dexter v. Arnold, 3 Sumn. 152, Fed. Cas. No. 3,859; Badger v. Badger, 2 Cliff. 137, Fed. Cas. No. 718.

SAME—PLEAS TO DISCOVERY ALONE.

322. Objections that may be well pleaded to both the relief and discovery cannot be pleaded to the discovery alone.

Although, as has been seen, objections that are good both to the relief and the discovery, if so pleaded, may be pleaded to the relief alone, and the discovery given in an answer,[1] such objections cannot be pleaded to the discovery alone, and the relief be answered, for that would be to compel the complainant to try his case upon an answer, without either a discovery, or the compensating advantages which a plea would have given him, while the defendant would enjoy all the benefits of both modes of defense without any of the disadvantages of either. Such objections, therefore, cannot be pleaded to the discovery alone. "Where the same principle upon which the demurrer to the discovery of the truth of certain charges in the complainant's bill is attempted to be sustained is equally applicable as a defense to the relief sought by the bill, the settled rule of the court is that the defendant cannot be permitted to demur as to the discovery only, and answer as to the relief.[2] This general rule is equally applicable to the case of a plea; and the defendant cannot plead any matters in bar of the discovery merely, when the matters thus pleaded would be equally valid as a defense to the relief."[3]

§ 322. [1] See ante, p. 451.

[2] Brownell v. Curtis, 10 Paige (N. Y.) 210, 213, citing Morgan v. Harris, 2 Brown, Ch. 124; Waring v. Mackreth, Forrest, 129; Story, Eq. Pl. 254, note; Welf. Eq. Pl. 133.

[3] Brownell v. Curtis, 10 Paige (N. Y.) 210, 213.

323. OBJECTIONS TO PARTICULAR DISCOVERY—Objections to particular discovery, founded upon the nature of the discovery sought, may be pleaded to such discovery alone. Objections of this character are, inter alia:

(a) That the discovery may subject the defendant to pains or penalties or a criminal prosecution.

(b) That it will subject him to a forfeiture or something in the nature of a forfeiture.

(c) That it will involve the disclosure of a privileged communication.

Where any of the above objections, or others similar in principle, exist, but do not appear upon the face of the bill, they may be set up by plea containing the necessary averments to show that the objection exists. The general nature of objections of this character has already been considered in connection with the subject of demurrers. It will also be touched upon hereafter in connection with pleas to bills for discovery. It seems unnecessary, therefore, to say more at this place.

PLEAS TO ORIGINAL BILLS NOT FOR RELIEF.

324. Objections available by way of plea to bills of this class are confined to bills of discovery.

325. Bills to perpetuate testimony or to examine witnesses de bene esse are anomalous, and cannot be defeated by any plea.

Prof. Langdell has pointed out very clearly the anomalies involved in the practice upon bills to perpetuate testimony and to examine witnesses de bene esse. In practice such bills are never brought to a hearing, no proofs are taken to support or disprove the bill, and there is no decree.[1] The complainant's own statement is conclusively deemed to be the whole truth. If such statement is defective upon its face, defendant may demur, but this is the only defense possible. A defense set up by plea or answer is wholly

§§ 324–325. [1] See ante, pp. 283, 286.

nugatory, for "the plaintiff is not required to prove his bill, nor has the defendant any opportunity to prove his defense." The case must, indeed, be put at issue, but this is a mere technical requirement. There is no decree made establishing plaintiff's right to take the testimony. "But, as soon as the cause is at issue, the plaintiff proceeds to do, without any authority, what he has not yet established any right to do, namely, to take the testimony which he is seeking to perpetuate. * * * This extraordinary anomaly seems to have arisen from confounding the testimony to be perpetuated with the testimony to establish the right to perpetuate." [2]

SAME—PLEAS TO BILLS OF DISCOVERY.

326. Pleas to bills of discovery are those which oppose the discovery therein prayed for upon some sufficient ground not apparent upon the face of the bill. The objections available by this method are generally the same as, when appearing on the face of the bill, are taken by demurrer.

327. Pleas of this character are generally classified as:

(a) Pleas to the jurisdiction.

(b) Pleas to the person.

(c) Pleas to the bill or to the frame of the bill.

(d) Pleas in bar.

328. Aside from the demurrer, a plea is the only method of defense to a bill seeking discovery only.

In General.

Pleas to bills of discovery are noticed here, as seems proper, in covering the entire system of the pleadings in equity, since it seems that bills of this class may still be used in some of the states, though in others they are considered as superseded by statutes making all parties competent witnesses, and in the federal courts are not now recognized, except, perhaps, in aid of a suit at law. When available, the grounds upon which they may be presented are nearly the same as in the case of demurrers to bills of dis-

[2] Langd. Eq. Pl. § 201.

covery, and many of them are the same as offered by pleas to bills for relief or relief and discovery.

Pleas to the Jurisdiction.

Pleas of this class rest generally upon the same grounds as have already been mentioned in considering demurrers and pleas to relief,[1] and properly apply where the complainant's case is such that a court of equity has no jurisdiction to compel a discovery in his favor, although, for the purpose of avoiding a demurrer, it is differently or falsely stated in the bill. Of these grounds may be mentioned the objection that the subject of the suit is of a political nature; or that another court is competent to give the discovery; or that the tribunal or the cause, when the bill is in aid of a suit at law, is not of such a character as the court will aid by discovery,—as if the cause be before arbitrators, or is of a criminal nature, or that the plaintiff has no interest in the suit.[2]

Pleas to the Person.

Pleas of this class are either to the person of the complainant, as that he has no right, title, or ability to call on the defendant for the discovery, or that the defendant is not liable to make it; or to the person of the defendant, that he is a mere witness, and has no interest in the subject-matter in controversy, or that he does not sustain the character in which he is sued, or that there is no privity between himself and the complainant to sustain the bill.[3]

If the bill alleges an interest in one who has none, he cannot protect himself by demurrer, but must resort to a plea or disclaimer;[4] and, if a plea is chosen, it must meet the charge of an interest with proper averments, and, under the general rule we have already considered, be supported by an answer.[5]

Pleas to the Bill or to the Frame of the Bill.

The pleas to the bill already considered, such as the pendency of another suit, the want of proper parties, or for the fault of multifa-

§§ 326–328. [1] Ante, c. 6, p. 387; c. 7, p. 454, and cases cited.

[2] Story, Eq. Pl. § 817. See Mendizabel v. Machado, 1 Sim. 68; Crouch v. Hickin, 1 Keen. 385.

[3] Story, Eq. Pl. § 818; ante, p. 456.

[4] Story, Eq. Pl. § 819; Coop. Eq. Pl. 294.

[5] Ante, p. 438.

riousness,[6] do not apply to bills of discovery, though perhaps the last objection would be good; as if a bill for discovery is multifarious it may compel the defendant to give answers and discoveries as to matters which are distinct and independent, and cannot properly belong to any single suit.[7] It may be also that, where a bill is brought in aid of a suit at law, the objection that the parties are not the same might be properly asserted by plea, when not apparent on the face of the bill, as in such case there would be a clear misjoinder of parties;[8] and so if the defendant was not a party to the suit at law, as no discovery by him could then be material.[9] A plea that the value of the matter in controversy is beneath the dignity of the court seems also to be a good objection to discovery.[10]

Pleas in Bar of Discovery.

The pleas in bar which are appropriate to bills of discovery, and which show it to be improper for the court to compel the discovery sought, are (1) that the discovery may subject the defendant to a criminal liability or to some penalty or forfeiture; (2) that it will involve a breach of professional confidence; and (3) that he is a purchaser for valuable consideration without notice of the plaintiff's title. All of these grounds of defense have been already sufficiently noticed in considering the grounds of demurrers to discovery,[11] and of pleas to relief,[12] and require no further explanation here.

It was for a long time doubtful whether the defendant to a bill seeking a discovery in aid of a suit at law could plead in bar to the discovery what is only a defense to the legal action. The right has been denied in this country,[13] but seems to be admitted in England.[14]

[6] Ante, p. 337.
[7] Story, Eq. Pl. § 820.
[8] See Glyn v. Soares, 3 Mylne & K. 450, 470.
[9] Id.
[10] Smets v. Williams, 4 Paige (N. Y.) 364.
[11] Ante, c. 6, p. 400; c. 3, p. 139, "Demurrer to Interrogatories."
[12] Ante, p. 452.
[13] Sperry v. Miller, 2 Barb. Ch. (N. Y.) 632.
[14] Story, Eq. Pl. § 821, and the English cases cited.

PLEAS TO BILLS NOT ORIGINAL.

329. Pleas to bills not original may be used, in general, to present many of the defenses available to original bills, and also such special defenses as may be proper, in the particular case, to show that the party filing the bill is not entitled to the special relief sought.

Pleas to Supplemental Bills and Bills of the Same Nature.

We have already noticed that, if a supplemental bill shows on its face that the complainant was not entitled to file it, the defendant may demur.[1] If the objection is not so apparent, he must make use of a plea. Thus, if the supplemental bill sets up matter which arose before the filing of the original bill, and which might have been the subject of an amendment, a plea will be proper.[2]

Pleas to Bills of Revivor and Bills of the Same Nature.

The grounds upon which pleas may be taken to bills of the above character are, in general, (1) that the plaintiff has no right to revive the suit against the defendant;[3] (2) the want of proper parties;[4] (3) that the right to revive is barred by the statute of limitations.[5] These defenses are based upon the fact that the peculiar relief sought is to be denied by reason of facts not appearing on the face of the bill, and a plea, in its averments, must contain proper allegations according to the general principles before stated[6] or it will be overruled.

Pleas to Cross Bills.

Cross bills, which only differ from original bills in that they are occasioned by a former bill, may be opposed by all pleas in bar to

§ 329. [1] Ante, c. 6, p. 405.

[2] Story, Eq. Pl. § 828.

[3] Story, Eq. Pl. § 829.

[4] See Bettes v. Dana, 2 Sumn. 383, Fed. Cas. No. 1,368. See, also, Fallowes v. Williamson, 11 Ves. 306; Merrewether v. Mellish, 13 Ves. 435.

[5] See Hollingshead's Case, 1 P. Wms. 742; Earl of Egremont v. Hamilton, 1 Ball & B. 531; Perry v. Jenkins, 1 Mylne & C. 118. See, also, Murray v. East India Co., 5 Barn. & Ald. 204.

[6] Ante, p. 433.

which original bills are liable, and, conversely, no plea in bar which cannot be taken to an original bill will hold against a cross bill.[7] As to other pleas, those to the jurisdiction and to the person are not available, the filing of his bill by the defendant being an affirmance of the sufficiency of the person bringing the original bill and the jurisdiction of the court;[8] but as a defendant cannot, by a cross bill, compel the plaintiff to discover the evidence of the defendant's title, objection on this ground could be taken by a plea.[9]

Pleas to Bills of Review and Bills of the Same Nature.

In the case of bills of review for errors apparent in the decree, while the demurrer appears to be the proper defense when the decree is fairly stated, and in other cases the defense is by plea of the decree and a demurrer against opening the enrollment, if there is any matter beyond the decree, such as lapse of time, or a purchase for valuable consideration, to be offered against the opening of the enrollment, such matter must be pleaded;[10] and an order enrolled, allowing a demurrer to a bill of review, may be pleaded in bar to a new bill of review upon the same grounds.[11]

Where a bill of review is brought upon a discovery of new matter, it is liable to any plea which would have avoided the effect of such new matter if charged in the original bill;[12] and it seems that the fact of the discovery of the new matter may be traversed by a plea, even after leave of court to bring the bill has been granted, as, if the fact of discovery is in issue, it should be proved by the plaintiff, and open to contrary evidence on the part of the defendant.[13]

A supplemental bill in the nature of a bill of review of a decree, not signed or enrolled, upon the alleged discovery of new matter, is open to a traverse of the fact of such discovery by plea and also by answer.[14]

[7] Story, Eq. Pl. § 832.

[8] Story, Eq. Pl. § 832.

[9] Bellwood v. Wetherell, 1 Younge & C. Exch. 211. And see Glegg v. Legh, 1 Bligh (N. S.) 302.

[10] Story, Eq. Pl. § 833. See Webb v. Pell, 3 Paige (N. Y.) 368.

[11] Story, Eq. Pl. § 833.

[12] Story, Eq. Pl. § 834.

[13] Mitf. Eq. Pl. (Jeremy's Ed.) 89, 292, 293.

[14] Story, Eq. Pl. § 835.

Pleas to Impeach Decrees for Fraud.

The proper defense to a bill of this character is a plea of the decree, denying the fraud and supported by an answer also denying it, according to the rule we have already noticed.[15]

Pleas to Carry Decrees into Execution.

As only persons interested under a decree can bring a bill to carry such decree into execution, if a person without such right or interest files a bill of this character his want of interest, when not apparent on the face of the bill, may be shown by plea.[16]

[15] Story, Eq. Pl. § 836; ante, p. 488.

[16] Story, Eq. Pl. § 837.

CHAPTER VIII.

THE ANSWER.

330. In General.
331–335. Nature and Office of the Answer.
336–339. Substance and Effect of the Answer.
340. Certainty.
341–342. Scandal and Impertinence.
343–345. Sufficiency of Answer.
346–347. Effect of Insufficiency in Answer.
348–350. Responsiveness.

IN GENERAL.

330. If a defendant in a suit in equity does not demur or plead, he must answer the bill; or, if he demurs or pleads to a part only of the bill, he must answer the remainder.

The last method of defense available to the defendant in the present order of pleading in equity is the answer, which, as we shall hereafter see, presents both the defense, strictly so called, and the discovery, if any, called for by the bill. By reason of the fact that most defenses, including many of those formerly advanced by demurrer or plea, can be more advantageously presented by the answer, it is now of much more importance than formerly, and particularly in the courts of the United States since the modification of the rule requiring a full answer.

In analogy to the rule of the common-law system which requires that, if a defendant does not demur, he must plead by way of traverse, or in confession and avoidance, the rule in equity is that, if he does not demur or plead, he must answer the bill, and, if a demurrer or plea is taken to a part of the bill, he must answer the remainder.[1]

§ 330. [1] Mitf. Eq. Pl. § 244.

Form of Answer.

The following example from Barton's Suit in Equity[2] will sufficiently illustrate the form of an answer in equity, and the different parts into which it may be subdivided:

(Title of Cause as in Bill.)[3]

TITLE OF ANSWER.

"The Joint and Several Answer of Edward Willis and William Willis, Two of the Defendants, to the Bill of Complaint of James Willis, an Infant, by John Willis, His Father and Next Friend.

PROTESTATION OR RESERVATION.

"These defendants, now and at all times hereafter reserving all manner of benefit and advantage to themselves of exception to the many errors and insufficiencies in said bill contained, for answer thereto, or unto so much or such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say:

BODY, OR SUBSTANCE, INCLUDING DISCOVERY.

"They admit that Thomas Atkins in said bill named did duly make and execute such last will and testament in writing, of such date and to such purport and effect as in said bill mentioned and set forth; and did thereby bequeath to the complainant, James Willis, such legacy of £800, in the words and for the purpose mentioned in said bill, or in words to a like purport and effect. They further admit that the said testator, Thomas Atkins, did by such will appoint these defendants executors thereof, and that the said testator died on or about the 20th day of December, 1748, without revoking or altering the said will. And these defendants further admit that they, some time after, to wit, about the month of January, 1750, duly proved said will in the prerogative court of the archbishop of Canterbury, and took upon themselves the burden of the execution thereof; and they are ready to produce said probate as this honorable court shall direct. They further admit that the said complainant, James Willis, by his said father, did, several times since the said legacy of £800 became payable, apply to them to have the same paid or secured for the benefit of said complainant, which these defendants decline to do, by reason that the said complainant was, and still is, an infant under the age of twenty-one years. Wherefore these defendants could not, as they are advised, be safe in making such payment, or in securing said legacy, in any manner for the benefit of said complainant, but by the order and direction, and under the sanction, of this honorable court.

"And these defendants, further answering, say that, by virtue of the said will, they possessed themselves of the real and personal

[2] Page 112.

[3] Ante, p. 180.

estate, goods, chattels, and effects, of the said testator to a considerable amount; and they admit that assets are come to their hands sufficient to satisfy said complainant's legacy, and subject to the payment thereof; and they are willing and desirous and do hereby offer to pay the same, as this honorable court shall direct, being indemnified therein.

DENIAL OR TRAVERSE.

"And these defendants deny all unlawful combination in said bill charged, without that any other matter or thing material for them to make answer to, and not herein sufficiently answered, avoided, or denied, is true to the knowledge or belief of these defendants.

PRAYER.

"All which matters and things these defendants are ready to aver and prove, as this court shall direct, and pray to be hence dismissed with their reasonable costs and charges, in this behalf most wrongfully sustained. G. MADDOCKS."

Title of Answer.

The beginning of the answer proper is the title, which, where the answer is by two of several defendants to a bill exhibited by an infant suing by his next friend, would be in the form given above. Where there are several complainants and defendants, if the latter join, the form would be: "The joint and several answers of C. D., E. F., and G. H., the above-named defendants, to the bill of complaint," etc., and where the suit is by a single complainant against a single defendant, the form will be, "the answer of C. D., defendant, to the bill of complaint of A. B., plaintiff." No exact form of words is invariably required, but it seems necessary that the title of the answer should be stated substantially as above given.

The Reservation.

As shown by the form already given, the title of the answer is followed by a reservation of all benefit and advantage which might be taken by exception to the bill, the object of which, when first adopted, was probably to prevent the defendant from being concluded by any assumption that matters in the bill which the answer did not expressly controvert were thereby admitted, especially such matters as have been objected to by plea or demurrer.[4] This form is one of long standing, and its use at the present day is perhaps more largely due to that fact than any other, as in the case of the

[4] Story, Eq. Pl. (10th Ed.) § 870. See, also, U. S. Eq. Rule 39.

protestation used in the demurrer and plea. Whenever the rule obtains that there can be no constructive admission by an answer, it can be of little effect.

In the case of an infant, who is entitled to the benefit of every possible exception to the bill without making it, the form is omitted.[5]

The Body, or Substance.

The body, or substance, of the answer follows the reservation, and consists of defendant's statement, his discovery in reply to the interrogatories propounded by the bill, according to his knowledge, remembrance, information, and belief, together with such additional matter as the defendant thinks proper to bring forward in his defense, either for the purpose of qualifying or adding to the case made by the bill, or of stating a new case on his own behalf.[6] This part of the answer will therefore contain all allegations of fact which the defendant makes, either as discovery or for defense, and is, strictly speaking, the real answer itself. The matters to be stated, and the method of stating them, are noticed elsewhere in this chapter.[7]

The Conclusion.

Following the body of the answer is the conclusion, in which is usually placed a general traverse or denial of all unlawful combination and confederacy charged in the bill, and of all other matters therein contained, save as expressly admitted or qualified, though it has been held that an answer might be good without this formal statement.[8] This general traverse is a form of ancient origin, and was first introduced at a time when the defendant simply presented his defense by the answer, without making a reply to every clause of the bill; and though, since the defendant is now supposed to answer the bill fully, the traverse seems impertinent and useless, the form is still retained,[9] as in the case of the reservation above mentioned, and the protestation in the demurrer and plea.[10]

In its form, as will be noted, this traverse is like the special traverse at common law, but without the absque hoc;[11] and it may be also stated that, in the case of an answer by an infant, this form,

[5] Story, Eq. Pl. § 871.
[6] Story, Eq. Pl. § 870.
[7] Post, p. 497.
[8] Mitf. Eq. Pl. § 314.
[9] Mitf. Eq. Pl. § 314; Story, Eq. Pl. 870.
[10] Ante, c. 6, p. 365; c. 7, p. 420.
[11] Shipman, Com. Law Pl. (2d Ed.) p. 307.

like the reservation, is omitted, an infant being deemed incapable of any combination against the rights of the complainant.[12]

The conclusion terminates with the prayer of the defendant that the bill be dismissed, and that he recover the costs and charges sustained by him.

NATURE AND OFFICE OF THE ANSWER.

331. The answer of the defendant in equity is his formal written statement of the facts of his defense to the merits of the case stated by the bill, as well as his response to such discovery as is called for by the interrogatories, if any, which the bill contains. It is the principal pleading by the defendant to the merits of the bill, and the last in order upon his side of the case.

332. The office of an answer is twofold:

(a) To present a defense to the merits of the bill; and

(b) To afford the discovery sought by the bill.

333. All or any of the grounds of defense to a bill may be presented by answer, and an objection which might have been made by demurrer or plea will be equally a bar to relief when insisted on by answer, except such objections as can be pleaded only in abatement. But, subject to exceptions to be hereafter mentioned, a defendant who submits to answer must answer fully; and therefore, as a general rule, an objection which might have been taken by demurrer or plea will not excuse defendant from giving the discovery required by the bill.

334. An answer may be used in the same suit in conjunction with a disclaimer, plea, or demurrer, or all or any of these methods of defense, provided each method is directed to a distinct and separate part of the bill. An answer covering what has already been

[12] Mitf. Eq. Pl. §§ 314, 315; Story, Eq. Pl. § 871.

opposed by demurrer or plea will ordinarily, if simultaneously presented, overrule such pleading, but it may generally be used as a final method of defense after preliminary defenses of the same matter have been unsuccessfully presented.

335. An answer must generally be signed by the defendant and in general by counsel, and must be under the oath of the defendant, unless such oath is expressly waived by the complainant or dispensed with by statute or rule of court, or unless the defendant is a corporation.

In the early practice of the court of chancery, the defendant, after appearance, was examined personally before the chancellor, or the master of the rolls, and such answer as was there made to the petition or bill of the complainant seems to have been mostly oral, though in a few instances records of answers and examinations have been preserved.[1] The answer was then, and for a long time after the adoption of written pleadings, loose and informal in its structure, and appears to have been little more than a general statement of the defendant's case, accompanied by a denial or traverse of all such matters as it was deemed material to deny in order to put the complainant upon proof.[2] In modern times, however, the form and structure of the answer is regulated by well-settled rules, and, though the same strictness is not observed as in the case of the bill, there are certain essential requirements, as we shall hereafter see, which cannot be disregarded if the answer is to be effective in protecting the defendant's rights. Thus, it must be direct and positive, so far as the defendant's knowledge extends, and beyond that he must answer upon information and belief; and it must be not only responsive to the bill in order to render it available as evidence, but it must be sufficient as an answer, in deference to a well-settled rule that "he who submits to answer must answer fully."

While analogous to the plea in bar at common law, particularly the special traverse, it fills, in addition, the office of supplying proof

§§ 331–335. [1] See 1 Spence, Eq. Jur. §§ 372–374.

[2] Mitf. Eq. Pl. (Jeremy's Ed.) 306–308.

in aid of the determination of the controversy, and, in brief, is the one important pleading of the defendant in opposition to the merits of the bill.[3] The term "answer" is therefore somewhat ambiguous, since it denotes both the defense, properly so called, and the discovery or response to the complainant's interrogatories;[4] but as, in practice, the two are not ordinarily separated more than enough to distinguish the one from the other, the designation is properly the only one that can be applied.

As we have already seen with reference to the demurrer and plea, an answer may be interposed concurrently with one or more of the other methods of defense,[5] each being directed to different parts of the bill to avoid the danger of overruling the demurrer or plea by answering to the same matter, and thus waiving the objection to answering which those methods present, though in federal practice the mere fact that an answer extends to some part of the matter presented by the plea or demurrer will not necessarily cause this

[3] See Lube, Eq. Pl. pt. 2, c. 1, § 3, where the analogy between pleadings in equity and those at common law is fully discussed.

[4] "An answer, where relief is sought, properly consists of two parts: First, of the defense of the defendant to the case made by the bill; and, secondly, of the examination of the defendant on oath as to facts charged in the bill of which a discovery is sought. Beech v. Haynes, 1 Tenn. Ch. 574. It combines, therefore, two proceedings which, in the civil law and in the ecclesiastical courts, were completely separated. In the civil law the pleadings were made up before the prætor, who afterwards gave the parties judges, and it was before these judges that the actor (plaintiff) propounded his positions in the libellus articulatus, to which the defendant was required to put in an answer in the nature of a discovery. Gilb. Forum Rom. 90. In the ecclesiastical courts, also, the answer to the interrogatories for discovery was a wholly distinct instrument from the responsive allegation to the libel embodying the defense. Hare, Disc. 223. In a bill in equity both of these distinct parts united in one instrument. And this ambiguity in the use of the word 'answer,' a word importing a double sense and office, has sometimes, says Judge Story, led to erroneous decisions, and to no small confusion of language. Story, Eq. Pl. § 850. Mr. Wigram, in his discriminating thesis on Points of Discovery, p. 10, note, regrets that the division of the civil and ecclesiastical law has not been retained in equity proceedings. 'The difficulty,' he says, 'of finding out the issue, in the present mode of pleading, is alone a sufficient reason for desiring it.'" Smith v. Insurance Co., 2 Tenn. Ch. 599, 601.

[5] Eq. Rule 32, quoted in Story, Eq. Pl. § 441, note 3; Pierpont v. Fowle, 2 Woodb. & M. 23, Fed. Cas. No. 11,152.

result.[6] So an answer, if filed after a demurrer or plea overruled, may, in general, again present the same matter by way of defense,[7] and may generally be used to assert most defenses, except those which are clearly in abatement,[8] though, except in the federal courts,[9]

[6] Eq. Rule 37. It seems, however, that if the answer is broader than the plea, the plea will be overruled. Lewis v. Baird, 3 McLean, 56, Fed. Cas. No. 8,316. But, if the complainant sets down the plea or demurrer for argument, the objection as to the answer will be waived. Hayes v. Dayton, 18 Blatchf. 420, 8 Fed. 702.

[7] Piatt v. Oliver, 2 McLean, 267, Fed. Cas. No. 11,115.

[8] The statute of limitations may be set up by answer as well as by a formal plea. Pierce v. McClellan, 93 Ill. 245. Cf. Nichols v. Padfield, 77 Ill. 253; Borders v. Murphy, 78 Ill. 81; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178; Highstone v. Franks, 93 Mich. 52, 52 N. W. 1015; Smith v. Hickman, Cooke (Tenn.) 330; Van Hook v. Whitlock, 7 Paige (N. Y.) 373. The statute of limitations must be set up either by demurrer, plea, or answer, or it will be deemed waived. Borders v. Murphy, 78 Ill. 81; Gibson v. Green's Adm'r, 89 Va. 524, 16 S. E. 661; Chambers v. Chalmers, 4 Gill & J. (Md.) 420. The statute of frauds may be set up by answer. Tarleton v. Vietes, 1 Gilman (Ill.) 470. The statute of frauds must be pleaded to be available. McClure v. Otrich, 118 Ill. 320, 8 N. E. 784; Tarleton v. Vietes, 6 Ill. 470; Cozine v. Graham, 2 Paige (N. Y.) 177; Ashmore v. Evans, 11 N. J. Eq. 151; Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436. But see Ontario Bank v. Root, 3 Paige (N. Y.) 478; May v. Sloan, 101 U. S. 231; Busick v. Van Ness, 44 N. J. Eq. 82, 12 Atl. 609; Wakeman v. Dodd, 27 N. J. Eq. 564. Cf. Force v. Dutcher, 18 N. J. Eq. 401. Laches may be availed of as a defense by way of answer. Snow v. Manufacturing Co., 153 Mass. 456, 26 N. E. 1116. In the federal courts, laches is available as a defense, though not pleaded. Credit Co. v. Arkansas Cent. R. Co., 15 Fed. 46; Sullivan v. Railroad Co., 94 U. S. 806; Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. 350. In Illinois laches must be pleaded. School Trustees v. Wright, 12 Ill. 432; Zeigler v. Hughes, 55 Ill. 288. But see Williams v. Rhodes, 81 Ill. 571; Sloan v. Graham, 85 Ill. 26. Want of jurisdiction may be set up in an answer. Ryan v. Duncan, 88 Ill. 144; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 574; Fulton Bank v. New York & S. Canal Co., 4 Paige (N. Y.) 127; Grandin v. Leroy, 2 Paige (N. Y.) 509. In Tennessee, under Mill. & V. Code, §§ 5061, 5062, 5064, objections to the jurisdiction must be taken by plea for demurrer, and cannot be

[9] See Eq. Rule 39. Gaines v. Agnelly, 1 Woods, 238, Fed. Cas. No. 5,173; Samples v. Bank, 1 Woods, 523, Fed. Cas. No. 12,278. The rule does not apply to pleas to the jurisdiction. Livingston's Ex'x v. Story, 11 Pet. 352; Wickliffe v. Owings, 17 How. 47. Under Eq. Rule 39 defendant may join in his answer all matters of defense in bar or to the merits of the bill. Holton v. Guinn, 65 Fed. 450.

the rule requiring a full answer, where one is attempted, may render it more prudent to adopt the use of the demurrer or plea, and thus avoid a discovery. It is settled, however, that a defendant cannot simultaneously demur, plead, and answer to the whole bill.[10]

taken by answer. See Lowry v. Naff, 4 Cold. (Tenn.) 370; Vincent v. Vincent, 1 Heisk. (Tenn.) 333; Leverton v. Waters, 7 Cold. (Tenn.) 20; Kirkman v. Snodgrass, 3 Head (Tenn.) 370. An objection to the jurisdiction, on the ground that there is a remedy at law, may be taken by answer. Ryan v. Duncan, 88 Ill. 144. Where the defendant answers and submits to the jurisdiction, he waives the objection that the remedy is adequate at law, the case being by subject-matter a case of general equitable cognizance. Stout v. Cook, 41 Ill. 447. Followed by Magee v. Magee, 51 Ill. 500; Parker v. Parker, 61 Ill. 369. Cf. Peeples v. Peeples, 19 Ill. 269; United States Ins. Co. v. Central Nat. Bank, 7 Ill. App. 426. A bona fide purchase for value and without notice may be set up by way of answer. Wyckoff v. Sniffen, 2 Edw. Ch. (N. Y.) 581; Denning v. Smith, 3 Johns. Ch. (N. Y.) 332; Harris v. Fly, 7 Paige (N. Y.) 424; Murray v. Finster, 2 Johns. Ch. (N. Y.) 155; Wormley v. Wormley, 8 Wheat. 421, 449; Boone v. Chiles, 10 Pet. 177; Johnson v. Toulmin, 18 Ala. 50; Doswell v. Buchanan's Ex'rs, 3 Leigh (Va.) 365; Donnell v. King's Heirs, 7 Leigh (Va.) 393; Tompkins v. Mitchell, 2 Rand. (Va.) 428, 430; High v. Batte, 10 Yerg. (Tenn.) 335. But see Story, Eq. Pl. § 847. Fraud may be set up as a defense by answer. Bertine v. Varian, 1 Edw. Ch. (N. Y.) 343; Watkins v. Land Co., 91 Tenn. 683, 20 S. W. 246; McGuckinn v. Kline, 31 N. J. Eq. 454. But see O'Brien v. Hulfish, 22 N. J. Eq. 472; Parker v. Hartt, 32 N. J. Eq. 225; Parker v. Jameson, Id. 222. An objection that joint complainants have no joint or common right is waived by answering. Latham v. McGinnis, 29 Ill. App. 152. Res judicata may be set up as a defense by answer. Galloway v. Hamilton's Heirs, 1 Dana (Ky.) 576; Arnold v. Kyle, 8 Baxt. (Tenn.) 319; Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. 719; President, etc., of Bank of U. S. v. Beverly, 1 How. 134. U. S. Rev. St. § 4920, authorizes certain defenses in patent cases, and regulates the manner of pleading them. See generally, as to defenses in patent cases, Bates v. Coe, 98 U. S. 31; Parks v. Booth, 102 U. S. 96; Agawam Woolen Co. v. Jordan, 7 Wall. 583; Saunders v. Allen, 53 Fed. 109. Facts on which defendants propose to rely should be set up in the answer. Match v. Hunt, 38 Mich. 1. Estoppel from maintaining a bill in equity cannot be relied on unless pleaded. Dale v. Turner, 34 Mich. 405. Where the complainant, anticipating a particular defense, alleges facts intended to show its invalidity, he relieves the defendant from the burden of setting up such defense. The defendant may accept the issue so presented, and limit his averments and proof accordingly. Eldridge v. Pierce, 90 Ill. 474.

[10] Crescent City Live-Stock, Landing & Slaughterhouse Co. v. Butchers' Union Live-Stock, Landing & Slaughterhouse Co., 12 Fed. 225.

Signature.

As in the case of the other regular pleadings in equity, the answer of the defendant must generally be signed by counsel, as a guaranty of good faith, and that the answer made is proper for the consideration of the court, and not sham or frivolous.[11] In general, an answer must be under the signature of the defendant,[12] unless this formality is dispensed with by consent of the parties to the cause,[13] or unless, for sufficient reasons, the court directs the answer to be received without it.[14] In many jurisdictions the signatures of both counsel and defendant are not required, especially where an answer under oath is waived.[15]

The Oath, or Verification.

The answer of the defendant is always made under oath, unless this requirement is waived by the complainant in his bill, or unless the defendant is a corporation; the answer, in the latter case, being under the corporate seal.[16] The importance of this requirement lies

[11] Story, Eq. Pl. § 876. If the answer be taken by commissioners, the signature of counsel is not required. Davis v. Davidson, 4 McLean, 136, Fed. Cas. No. 3,631.

[12] Story, Eq. Pl. § 875; Bayley v. De Walkiers, 10 Ves. 441; Harding v. Harding, 12 Ves. 159; Kimball v. Ward, Walk. (Mich.) 439; Danison v. Bassford, 7 Paige (N. Y.) 370. An answer is sufficiently signed by defendant where he signs the affidavit verifying the same. Ballard v. Kennedy, 34 Fla. 483, 16 South. 327. The court may allow defendant to sign his answer where objected to because not signed. Holton v. Guinn, 65 Fla. 450. An answer must be signed, notwithstanding complainant has, by his bill, waived an answer under oath. Kimball v. Ward, Walk. (Mich.) 439. The defendant need not write his own name to his answer; it is enough that it is written with his consent. Fulton Co. Sup'rs v. Mississippi & W. R. Co., 21 Ill. 338, 367, per Breese, J.

[13] Coop. Eq. Pl. 326, 327.

[14] Coop. Eq. Pl. 326, 327. See, also, —— v. Lake, 6 Ves. 171; —— v. Gwillim, Id. 285.

[15] May v. Williams, 17 Ala. 23; Henry v. Gregory, 29 Mich. 68; Stadler v. Hertz, 13 Lea (Tenn.) 315; Johnson v. Murray, 12 Lea (Tenn.) 109; Sears v. Hyer, 1 Paige (N. Y.) 483; Dumond v. Magee, 2 Johns. Ch. (N. Y.) 240; Hatch v. Eustaphieve, Clark, Ch. (N. Y.) 63; Freehold Mut. Loan Ass'n v. Brown, 28 N. J. Eq. 42; Dickerson v. Hodges, 43 N. J. Eq. 45, 10 Atl. 111; Fulton Co. Sup'rs v. Mississippi & W. R. Co., 21 Ill. 338; Me. Rev. St. 629, § 15; Supp. Pub. St. Mass. 1882–88, p. 126, § 10.

[16] Union Bank of Georgetown v. Geary, 5 Pet. 99, 110. A joint answer must be sworn to by all the defendants joining. Masterson v. Craig, 5 Litt. (Ky.)

in the fact that the effect of the answer, so far as it is responsive to the bill, is thereby determined, it being evidence in the cause, if responsive and sworn to, as we have elsewhere seen;[17] but if not sworn to, or though under oath, if the oath has been waived, it is generally only a mere pleading.[18]

The complainant, in his bill, may waive an answer under oath, and, in the federal courts, may require a sworn answer to only certain specified interrogatories.[19] In the latter case the answer, though made under oath, is not evidence in favor of the defendant, except so far as responsive to such interrogatories, unless the cause is set down for hearing on bill and answer alone; but it may be used as an affidavit for certain purposes.[20] The waiver of an oath by

39; Cook v. Dews, 2 Tenn. Ch. 496; Young v. Manufacturing Co., 27 N. J. Eq. 67; Binney's Case, 2 Bland (Md.) 99. Objection that an answer is not verified may be obviated by the court's allowing its verification. Holton v. Guinn, 65 Fed. 450. Where the bill does not explicitly waive oath, the answer must be sworn to. Paige v. Broadfoot, 100 Ala. 610, 13 South. 426. See Supp. Pub. St. Mass. 1882–88, p. 126, § 10. Where no interrogatories are annexed to or accompany a bill, the answer need not be under oath; and, if it is made under oath, it cannot be used as evidence for defendant, though any admissions of fact therein may be used against him. Cummins v. Jerman, 33 Atl. 622, 6 Del. Ch. 122. Regularly, an answer by a corporation aggregate should be under seal. It need not be under oath. Fulton County Supervisors v. Mississippi & W. R. Co., 21 Ill. 338; Larrison v. Railroad Co., 77 Ill. 11; Vermilyea v. Fulton Bank, 1 Paige (N. Y.) 37; Champlin v. City of New York, 3 Paige (N. Y.) 573; Gamewell Fire-Alarm Tel. Co. v. Mayor, etc., 31 Fed. 312; Baltimore & O. R. Co. v. City of Wheeling, 13 Grat. (Va.) 40; Van Wyck v. Norvell, 2 Humph. (Tenn.) 192; McLard v. Linnville, 10 Humph. (Tenn.) 163. As to dissolution of injunction on answer of corporation, see Griffin v. Bank, 17 Ala. 258; Fulton Bank v. New York & S. Canal Co., 1 Paige (N. Y.) 311. Cf. Haight v. Morris Aqueduct, 4 Wash. C. C. 601, Fed. Cas. No. 5,902. See, also, Miss. Ann. Code (1892) § 534. If a discovery is sought, individual corporators may be sworn, but they must be named as defendants in the bill. Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539.

[17] Ante, c. 3, p. 133; post, p. 504.

[18] Union Bank of Georgetown v. Geary, 5 Pet. 99. See, also, Smith v. Clarke, 4 Paige (N. Y.) 368; Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740.

[19] Eq. Rule 41, as amended May 6, 1872. See, also, Story, Eq. Pl. § 874; Billingslea v. Gilbert, 1 Bland (Md.) 566; Contee v. Dawson, 2 Bland (Md.) 264.

[20] Eq. Rule 41, as amended.

the complainant is of no effect, however, unless accepted by the defendant.[21]

SUBSTANCE AND EFFECT OF THE ANSWER.

336. In its method, the answer generally either

(a) Controverts the facts stated in the bill, or some of them, and states other facts showing the rights of the defendant in the subject-matter of the suit; or

(b) Admits the truth of the case made by the bill, and, either with or without the statement of additional facts, submits the case to the judgment of the court.

337. In its form and substance, it must be a full and perfect answer to all material allegations of the bill, confessing and avoiding, denying, or traversing, all such allegations, without evasion, and avoiding scandal and impertinence. It must state facts, not argument, and, as to facts within his own knowledge, the defendant must answer positively; otherwise upon information and belief.

338. According to its theory and effect, it is in general available for purposes of defense only, and cannot be used to present matter as a ground for affirmative relief. If affirmative relief is sought, the defendant must ordinarily file a cross bill.

339. If sufficient in substance and form, its effect, as a method of defense, is to prepare the controversy, so far as the defendant is concerned, for a hearing and decision by the court, upon its merits.

Substance and Method, in General.

An answer generally controverts the material facts stated in the bill, or some of them, by a traverse or denial, and alleges other facts to show the rights of the defendant in the subject-matter of the suit;

[21] Amory v. Lawrence, 3 Cliff. 523, 524, Fed. Cas. No. 336; Heath v. Railroad Co., 8 Blatchf. 347, 348, Fed. Cas. No. 6,306.

the defendant's statement, aside from denials and discovery, being a narrative of the facts of his relation to the case.[1]

As another method, also, the answer may admit the truth of the material allegations of the bill, and, either with or without stating additional facts, submit the questions arising upon the case thus made for the decision of the court.[2] If it thus admits the facts charged, or such as are material to the complainant's case, and states nothing additional, or nothing more than the complainant can admit, no further pleading is necessary, and the case goes to a hearing upon the bill and answer;[3] the whole of the latter, whether directly responsive to the bill or not, being then taken as true.[4] If,

§§ 336-339. [1] Story, Eq. Pl. § 849. "Resort is frequently had to an answer, in order to set up a defense which would be appropriate in a plea, for the reason that less certainty and precision is required in an answer than in a plea." McCabe v. Cooney, 2 Sandf. Ch. (N. Y.) 314, 318. An answer may contain as many defenses as defendant sees fit to set up. Hopper v. Hopper, 11 Paige (N. Y.) 46. See ante, p. 417, as to allowance of double pleas; and see, also, Saltus v. Tobias, 7 Johns. Ch. (N. Y.) 214. Cf. Van Hook v. Whitlock, 3 Paige (N. Y.) 408, 419. Matters occurring after the filing of the bill may be set up as a defense in the answer. Lyon v. Brooks, 2 Edw. Ch. (N. Y.) 110.

[2] Story, Eq. Pl. § 849.

[3] Ante, c. 3, p. 138.

[4] Salmon v. Clagett, 3 Bland (Md.) 125; Bierne v. Ray, 37 W. Va. 571, 16 S. E. 804; Cook Co. v. Great Western R. Co., 119 Ill. 218, 10 N. E. 564, 567; Atkinson v. Manks, 1 Cow. (N. Y.) 691; Dale v. McEevers, 2 Cow. (N. Y.) 118; Brinkerhoff v. Brown, 7 Johns. Ch. (N. Y.) 217; Durfee v. McClurg, 6 Mich. 223, 232; Davenport v. Auditor General, 70 Mich. 192, 38 N. W. 211; Huyck v. Bailey, 100 Mich. 223, 58 N. W. 1002; Walton v. Cody, 1 Wis. 420; Jones v. Mason, 5 Rand. (Va.) 577; Findlay v. Smith, 6 Munf. (Va.) 134, 142; Doremus v. Cameron, 49 N. J. Eq. 1, 22 Atl. 802; Belford v. Crane, 16 N. J. Eq. 265; McCully v. Peel, 42 N. J. Eq. 493, 8 Atl. 286; McKim v. Odom, 3 Bland (Md.) 407; Estep v. Watkins, 1 Bland (Md.) 486; Eversole v. Maull, 50 Md. 95; U. S. v. Scott, 3 Woods, 334, Fed. Cas. No. 16,242; U. S. v. Trans-Missouri Freight Ass'n, 7 C. C. A. 15, 58 Fed. 58; Leeds v. Insurance Co., 2 Wheat. 380; Payne v. Frazier, 4 Scam. (Ill.) 55; followed by Mason v. McGirr, 28 Ill. 322; Cassell v. Ross, 33 Ill. 244; Farrell v. McKee, 36 Ill. 225; Knapp v. Gass, 63 Ill. 492; Fordyce v. Shriver, 115 Ill. 530, 5 N. E. 87. And see Buntain v. Wood, 29 Ill. 504. The answer is to be taken as true, under the statute, on hearing upon bill and answer without replication, only where the cause is formally so set for hearing. Corbus v. Teed, 69 Ill. 205. Where exceptions to an answer are sustained, the answer is not to be taken as true if a replication is filed; it is to be taken as true only where the exceptions are disallowed and the com-

however, all material facts of the complainant's case are not admitted, or if the answer, while admitting them, states additional facts which the complainant cannot consistently admit, the truth of the answer may be, and usually is, denied, and the sufficiency of the bill affirmed, by a replication, which, as we have seen, is the last regular pleading in the series.[5]

As a Defense.

It may be observed here that it is a well-settled rule that, in general, the defendant cannot, by answer, obtain affirmative relief, both theory and form limiting it to the purposes of defense, and a method being provided, by cross bill, in cases where the defendant believes himself entitled to such relief.[6] It may also be mentioned that an

plainant abides by them. Mix v. People, 116 Ill. 265, 4 N. E. 783. Cf. Prettyman v. Barnard, 37 Ill. 105. If no exceptions are taken to the answer, nor any replication filed, the answer is to be taken as true. Stone v. Moore, 26 Ill. 165. As to statutory changes in rule, see Code Ala. 1886, § 3445; Bates v. Murphy, 2 Stew. & P. (Ala.) 165; Green v. Casey, 70 Ala. 417; Foxworth v. White, 72 Ala. 224, 231; White v. Bridge Co., 4 Ala. 464; McGowen v. Young, 2 Stew. & P. (Ala.) 160; Wells v. Query, Litt. Sel. Cas. (Ky.) 210; Miss. Ann. Code 1892, § 540; Carman v. Watson, 1 How. (Miss.) 333.

[5] Ante, p. 97. Where the case is heard upon bill, answer, and replication, the answer will be taken as true only so far as it is responsive to the bill. Winkler v. Winkler, 40 Ill. 179, 183; Cummins v. Cummins, 15 Ill. 33; U. S. v. Ferguson, 54 Fed. 28; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Voorhees v. Voorhees, 18 N. J. Eq. 223. And see Glenn v. Helb, 12 Gill & J. (Md.) 271.

[6] Ante, p. 303. See, also, Ballance v. Underhill, 3 Scam. (Ill.) 453. Followed by Tarleton v. Vietes, 1 Gilm. (Ill.) 470; McConnell v. Hodson, 2 Gilm. (Ill.) 640; Jones v. Smith, 14 Ill. 229; Rowan v. Bowles, 21 Ill. 17; McConnel v. Smith, 23 Ill. 611; Mason v. McGirr, 28 Ill. 322; Hurd v. Case, 32 Ill. 45; Stone v. Smoot, 39 Ill. 409; McCagg v. Heacock, 42 Ill. 153; Hanna v. Ratekin, 43 Ill. 462; Titsworth v. Stout, 49 Ill. 78; Conwell v. McCowan, 53 Ill. 363; Fitzhugh v. Smith, 62 Ill. 486, 490; Norman v. Hudleston, 64 Ill. 11; Price v. Blackmore, 65 Ill. 386, 389; Campbell v. Benjamin, 69 Ill. 244; Smith v. West, 103 Ill. 332; White v. White, Id. 438; Anderson v. Henderson, 124 Ill. 164, 16 N. E. 232; Follansbee v. Mortgage Co., 7 Ill. App. 486. Cf. Thielman v. Carr, 75 Ill. 385; Purdy v. Henslee, 97 Ill. 389. Matters of mere defense should be set up by answer, not by cross bill. Hook v. Richeson, 115 Ill. 431, 5 N. E. 98. Prior to the adoption of Ch. Rule 123, a cross bill was necessary if defendant desired affirmative relief beyond what complainant's bill would afford him. Schwarz v. Sears, Walk. (Mich.) 170; Vary v. Shea, 36 Mich. 388.

answer is not effective, as such, until it is filed,[r] the theory of equity pleading contemplating a record in court.

CERTAINTY.

340. The answer must state the matters of fact which it recites clearly and with certainty, avoiding ambiguity, argument, and the allegation of inferences or conclusions of law or inconsistent defenses; but a less degree of certainty is required than in framing the bill.

So much has been elsewhere noticed in the present chapter that would properly come under this head that it is unnecessary to do

Ch. Rule 123, authorizing a defendant in his answer to present the facts upon which his equity rests without filing a cross bill, still requires him to state a case for equitable relief touching the matter in question in the original bill; and an answer to a bill to quiet title is insufficient, as a basis for affirmative relief, if it alleges that the deed under which complainant claims was obtained by fraud, with knowledge, etc., without stating by whom or how the fraud was committed. McGuire v. Circuit Judge, 69 Mich. 593, 37 N. W. 568. It is not the intention of said rule 123 to deprive a party of any of his substantial rights secured to him by a resort to a cross bill, but to preserve to him all the benefits to be derived from the cross bill by stating the substance thereof in his answer, and the complainant is entitled to make defense to matter so set up in the answer as fully as he could have done before the rule was made. Hackley v. Mack, 60 Mich. 591, 27 N. W. 871. Said rule 123 does not apply to a suit where the answer had already been filed at the time the rule was adopted. Hackley v. Mack, 60 Mich. 591, 27 N. W. 871. See, also, as to necessity of prayer for affirmative relief in answer, Cooley v. Harris, 92 Mich. 135, 52 N. W. 997. See generally, as to obtaining affirmative relief, Miss. Ann. Code 1892, § 536; Bay v. Shrader, 50 Miss. 326; Harrison v. Harrison, 56 Miss. 174; Millsaps v. Pfeiffer, 44 Miss. 805; R. I. Pub. St. 1882, p. 507, § 16; Tenn. Code (Mill. & V.) § 5066; Odom v. Owen, 2 Baxt. (Tenn.) 446; Nichol v. Nichol, 4 Baxt. (Tenn.) 145; W. Va. Code, p. 805, § 35; Middleton v. Selby, 19 W. Va. 167; Armstrong v. Wilson, Id. 108. As to affirmative relief without cross bill in patent cases brought under U. S. Rev. St. § 4918. See American Clay-Bird Co. v. Ligowski Clay-Pigeon Co., 31 Fed. 466. When affirmative relief may be had by answer instead of cross bill, the sufficiency of the answer to entitle defendant to the relief may be tested by demurrer. Rust v. Rust, 17 W. Va. 901. And see McMullen v. Eagan, 21 W. Va. 234.

[r] Giles v. Eaton, 54 Me. 186.

more than state the general requirements in this respect, as, though a less degree of certainty is required in the answer than in the bill,[1] it is still requisite that the former should conform substantially to a rule that is of universal application in all pleading.[2] We have already noticed that the allegations of fact which the answer contains must be direct and full, covering the whole case made by the bill, or the whole of such part as the answer opposes, and that, as to matters within the knowledge of the defendant, it must be positive.[3] According to its theory and nature, it must state facts only, avoiding inferences or conclusions. The faults of ambiguity and argumentativeness are as objectionable in equity as at common law; and in construing an answer it will be taken most strongly against the defendant offering it.[4] Again, while an answer, unlike a plea, may

§ 340. [1] See King v. Ray, 11 Paige (N. Y.) 235; Jenkins v. Greenbaum, 95 Ill. 11; ante, p. 322.

[2] The rule is that a pleading must be framed with sufficient certainty to fully apprise the opposing party as to what he will be called upon to meet on the trial or at a hearing on the merits. See Cummings v. Colman, 4 Rich. Eq. (S. C.) 509.

[3] Ante, p. 497, § 337.

[4] The rule in this respect appears to be the same in equity as at common law, though perhaps more liberal in its application. It has been so applied in construing the bill in equity (see Lockard v. Lockard, 16 Ala. 423), and there seems no reason why it may not also be adopted in the case of an answer. Generally, as to certainty in answers, see Utica Ins. Co. v. Lynch, 3 Paige (N. Y.) 210; Smith v. Lasher, 5 Johns. Ch. (N. Y.) 247; Morris v. Parker, 3 Johns. Ch. (N. Y.) 297; Taylor v. Luther, 2 Sumn. 228, Fed. Cas. No. 13,796; Smith v. Loomis, 5 N. J. Eq. 60; New England Bank v. Lewis, 8 Pick. 113, 119; Savage v. Benham, 17 Ala. 119; Hill v. Lackey, 9 Dana (Ky.) 81; Bissell v. Bozman, 2 Dev. Eq. (N. C.) 154, 163; Bailey v. Wilson, 1 Dev. & B. Eq. (N. C.) 182, 187. An answer to an interrogatory must be positive and direct, and not argumentative. New England Bank v. Lewis (1829) 8 Pick. (Mass.) 113, 119. An answer should show facts, and not conclusions of law. Attorney General v. President, etc., of Oakland County Bank, Walk. (Mich.) 90; Chambers v. Chalmers, 4 Gill & J. (Md.) 420; Hood v. Inman, 4 Johns. Ch. (N. Y.) 437; Gainer v. Russ, 20 Fla. 157; Stone v. Moore, 26 Ill. 165. If a bill sets forth matter which may avoid a bar to the suit, it must be particularly and precisely denied in the answer. New England Bank v. Lewis (1829) 8 Pick. (Mass.) 113, 117. Where an allegation is made in the bill with divers circumstances, the defendant should not in his answer deny the allegations literally, as laid in the bill, but should answer the point of substance positively and with certainty. Jones v. Wing, Har. (Mich.) 301. In equity pleadings, denials or admissions should

set up as many defenses as the defendant may choose or have, such defenses must be consistent with one another, or the answer may be open to exception.[5]

SCANDAL AND IMPERTINENCE.

341. Scandal in the answer is the same as in the bill; that is, allegations of matters neither proper for the court to hear or for the defendant to state in a pleading, or which unnecessarily cast upon another the imputation of disgraceful or criminal conduct. Nothing relevant to the merits of the controversy can be so considered.

342. Impertinence is where the answer states matter outside of and irrelevant to the case made by the bill, and not material to the defendant's case. Scandalous matter is always impertinent, but the contrary is not true, and nothing will be deemed imperti-

be specific and direct, and it is not enough to allege that every allegation of the bill, not expressly admitted, is denied. Holton v. Guinn, 65 Fed. 450. The answer should show precisely and unambiguously the conclusions of fact intended to be drawn from the allegations. Vogle v. Ripper, 34 Ill. 100. A defendant who sets up certain facts in his answer, the consequence of which he states is to exhibit a particular defense, cannot, on final hearing, use the same facts to support a different defense, to which complainant's attention was not previously called. Bannister v. Miller (N. J. Ch.) 32 Atl. 1066. Where the defendant answers, he is bound by his answer to apprise the complainant clearly and unambiguously of the nature of the defense relied on. Cole v. Shetterly, 13 Ill. App. 420. A defense to a bill in equity fails, so far as it depends on any affirmative showing, where the evidence can be used only to establish an entirely different defense from that which the answer outlines. Harrington v. Brewer, 56 Mich. 301, 22 N. W. 813.

[5] Hopper v. Hopper, 11 Paige (N. Y.) 46; Stone v. Moore, 26 Ill. 165. Where no exception is taken to an answer containing inconsistent defenses, a decree for the defendant will not be reversed on account of such inconsistency. Scanlan v. Scanlan, 134 Ill. 630, 25 N. E. 652. That answer is bad which either contains inconsistent defenses or an alternative of inconsistent defenses. Jesus College v. Gibbs, 1 Younge & C. Exch. 145. But see Hummel v. Moore, 25 Fed. 390.

nent which can be of any influence in the decision of the suit, either as to subject-matter, the relief sought, or the costs.

We have already had occasion to notice the above faults in enumerating the defects that may exist in the bill,[1] and they need but brief mention here. Scandal in the answer is the same as in the case of the bill, as neither complainant nor defendant will be permitted to state upon the record matters which are unbecoming for the court to hear and improper for the parties to allege, such as those which are contrary to good manners or decency, nor allegations fixing a charge of criminal or disgraceful conduct upon a person, when such allegations are unnecessary in the particular case.[2] It seems, moreover, although the fault is generally treated as the same in both bill and answer, that more indulgence might be shown a complainant, in this respect, than a defendant, since allegations, apparently scandalous, might be necessary to enable the former to fairly present his case, while such allegations by the defendant, unless plainly relevant to his defense, would seem indicative of a malicious or improper motive, or of wanton disregard of the respect due to the court.

Scandalous matter will be expunged by order of court;[3] but, as in the bill, so in the answer, nothing that is relevant will be deemed scandalous, as it is not the nature of the matter which makes it so, but the method of stating it, or an unnecessary statement of it.[4]

The fault of impertinence is the same in both bill and answer, but may be illustrated to advantage: Thus, matters introduced into an answer to discredit a person in case he should be called as a witness, such as allegations concerning his relationship, means of living, etc., not responsive to the bill or necessary for the defense, or, in an answer to a bill for relief against a judgment at law, a state-

§§ 341–342. [1] See ante, c. 4, p. 348, and cases cited.

[2] 1 Daniell, Ch. Pl. & Prac. 347, 348.

[3] Story, Eq. Pl. § 862. See Erskine v. Garthshore, 18 Ves. 114; Sommers v. Torrey, 5 Paige (N. Y.) 54; Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 343; Saltmarsh v. Bower, 22 Ala. 221. The allegation of scandalous or impertinent matter in the bill will not justify similar matter in the answer. Langdon v. Pickering, 19 Me. 214.

[4] Ante, p. 348.

ment of the contents of a case made in the suit at law, and the judge's notes in such suit.[5] So, if a deed is unnecessarily set out in hæc verba,[6] or if the answer complains of acts of the complainant, but not in a way to benefit the defendant.[7] Scandalous matter is always impertinent,[8] but the contrary is not necessarily true, the term "impertinent" being used as compared with "pertinent" or "relevant."[9]

SUFFICIENCY OF ANSWER.

343. As a general rule, a defendant who answers the bill must answer fully and perfectly to all its material allegations.

344. But to this rule there are certain exceptions, and a defendant may, by answer, decline answering:

(a) To scandalous, impertinent, immaterial, or irrelevant matters.

(b) Where the answer would subject him to a penalty or forfeiture.

(c) Where the answer would involve a breach of professional confidence.

(d) Where the answer would consist of the discovery of facts respecting his own title.

(e) Where a person made defendant is a stranger to, and ignorant of, the facts charged in the bill and as to which discovery is sought.

(f) Perhaps, where the main defense is a denial of the complainant's right to sue, he may protect himself against the relief sought without further answer; and,

(g) In the federal courts, by rule, in cases where a plea might have been filed to set up a defense in bar of the suit, but the defendant chooses to offer such defense by answer, he need answer only to the same

[5] Norton v. Woods, 5 Paige (N. Y.) 260.

[6] Hood v. Inman, 4 Johns. Ch. (N. Y.) 437.

[7] Lawrence v. Lawrence, 4 Edw. Ch. (N. Y.) 357.

[8] Ante, p. 348. [9] Ante, p. 351.

extent as if defending by plea and answer. The rule does not apply where the defense is matter of abatement, or to the character of the parties, or matter of form.

345. The result of the rules stated may be thus summarized: Unless modified by statute or rule of court, objections to discovery upon grounds of merit or form should regularly be taken by demurrer or plea, but objections to "particular discovery may regularly be taken by answer."[1]

The General Rule.

The general rule of equity pleading, that a defendant who submits to answer must answer fully,—that is, must make a full and perfect answer to every material allegation which the bill contains,—is one which has been fully sustained by precedent, and, save as modified in federal practice, is still fully recognized.[2] It is perhaps the most important rule as to answering in equity, and, in its broadest sense, means that, save in the cases we shall hereafter notice, a defendant who answers the bill must do so fully and completely, confessing or traversing every material fact or allegation which the bill contains, and fully and explicitly answering all interrogatories, and not only answering each charge literally, but confessing or traversing the substance of each.[3] "To so much of the

§§ 343–345. [1] Wigc. Disc. p. 359.

[2] See McClaskey v. Barr, 40 Fed. 559; Home Insurance & Banking Co. of Texas v. Myer, 93 Ill. 271; Johnson v. Johnson, 114 Ill. 611, 3 N. E. 232; Russell & Erwin Manuf'g Co. v. Mallory, 10 Blatchf. 140, Fed. Cas. No. 12,166.

[3] Story, Eq. Pl. § 852. See 1 Daniell, Ch. Pl. & Prac. 712; Mountford v. Taylor, 6 Ves. 788, 792; Hepburn v. Durand, 1 Brown, Ch. 503; Bally v. Kenrick, 13 Price, 291; Salmon v. Clagett, 3 Bland (Md.) 125; Gilkey v. Paige, Walk. (Mich.) 520; Moors v. Moors, 17 N. H. 481; Woods v. Morrell, 1 Johns. Ch. (N. Y.) 103; Warren v. Warren, 30 Vt. 530; Davis v. Mapes, 2 Paige (N. Y.) 105; Chappell v. Funk, 57 Md. 465, 477; Mechanics' Bank v. Levy, 3 Paige (N. Y.) 606; Champlin v. Champlin, 2 Edw. Ch. (N. Y.) 362; May v. Williams, 17 Ala. 23; Tucker v. Railroad Co., 21 N. H. 29; Parkinson v. Trousdale, 3 Scam. (Ill.) 367; Vreeland v. Stone Co., 25 N. J. Eq. 140; Bank of Utica v. Messereau, 7 Paige (N. Y.) 517. Where the charge in the bill embraces several particulars, the answer should be in the disjunctive, denying or admitting each particular statement. Davis v. Mapes, 2 Paige (N. Y.) 105. See, also, Utica

bill as it is necessary and material for the defendant to answer, he must speak directly and without evasion, and must not merely answer the several charges literally, but he must confess or traverse the substance of each charge; and, wherever there are particular precise charges, they must be answered particularly and precisely,

Ins. Co. v. Lynch, 3 Paige (N. Y.) 210. An answer which does not confess and avoid, and only denies the allegations of the bill by implication, is insufficient. Kelley v. Ryder, 18 R. I. 455, 28 Atl. 807. The defendant is not bound to answer such portions of the bill as he has demurred to until the demurrer is passed upon. Ballance v. Loomis, 22 Ill. 82. If a defendant submits to answer the whole bill, he must answer fully, notwithstanding he might, by demurrer or plea to the whole bill, have protected himself against a particular discovery. Gilkey v. Paige, Walk. (Mich.) 520. The answer must either admit or deny the charges of the bill. It is not enough that it sets up a state of facts which, if true, would defeat the right to relief; that is the office of a plea. Hopkins v. Medley, 97 Ill. 402, 414. Where the answer is not full, the court should enforce one that is. Board of Sup'rs of Fulton Co. v. Mississippi & W. R. Co., 21 Ill. 338. The remedy is by exceptions, and, if defendant refuses to answer further, a decree pro confesso. De Wolf v. Long, 2 Gilman (Ill.) 679. Where an answer is insufficient, the proper practice is to except to it and compel a full disclosure. Ryan v. Melvin, 14 Ill. 68. Followed by Stone v. Moore, 26 Ill. 165. In Field v. Hastings & Bradley Co., 65 Fed. 279, Shiras, J., said: "As the bill does not contain any special interrogatories, it is entirely clear that the complainant's bill must be treated as one for relief only, and the sufficiency of the answer is to be determined as a matter of pleading." Where an answer is not under oath, exceptions do not lie thereto, because the answer is not evidence for the party who makes it. Brown v. Mortgage Co., 110 Ill. 235. Where the answer is not required to be under oath, exceptions can be taken to such matters only as are irrelevant, impertinent, or scandalous. Mix v. People, 116 Ill. 265, 4 N. E. 783, 786. Where answer under oath is waived by the complainant, exceptions cannot be taken to the answer, since it is a mere pleading. Smith v. McDowell, 148 Ill. 51, 35 N. E. 141. Under the early practice in chancery, exceptions would not lie to an answer not under oath. But in Illinois the chancery act requires a defendant to answer all allegations and interrogatories, whether the answer on oath is waived or not, and the practice as it formerly existed by which exceptions to an unsworn answer could not be filed is no longer the rule in this state by reason of this statute. James T. Hair Co. v. Daily, 161 Ill. 379, 43 N. E. 1096. Exceptions to the answer of a corporation under its corporate seal, will not lie to its sufficiency as a discovery, and would be a useless form to its sufficiency as a pleading. Smith v. Insurance Co., 2 Tenn. Ch. 599. In this last case the court said: "If this double office of an answer is kept in mind, the propriety of the rule which disallows exceptions to the sufficiency of an answer will be obvious; for, as has been observed by Chancellor Walworth,

and not in a general manner, though the general answer may amount to a full denial of the charges." [4] Whatever the complainant is bound to state in his bill the defendant is bound to answer.[5] Thus, an answer to a bill for the reconveyance of land purchased by the

the answer of a corporation, without oath, where the complainant does not require it to be sworn to or supported by the sworn answers of the officers of the corporation, cannot be said to answer the double purpose of a pleading to put the material matters of the bill in issue, and of an examination of the defendant for the purpose of obtaining his evidence in support of the complainant's allegations, and it is for this latter purpose alone that the complainant makes a witness of his adversary in the cause. Lovett v. Association, 6 Paige (N. Y.) 59. No doubt exceptions will lie to the sufficiency of an answer as a pleading as well as to its sufficiency as a discovery. But, to use the words of the same great chancellor in another case, as the general denial of all the matters of the bill not before answered, with which the answer usually concludes, is sufficient as a pleading to put the several matters of the bill in issue, the principal object of the exceptions for insufficiency is to examine the defendant on oath for the purposes of the discovery merely. Stafford v. Brown, 4 Paige (N. Y.) 360. The general denial with which an answer usually concludes is: 'Without this, that any other matter in the bill contained is true.' This traverse was, at one time, thought to be essential to an issue, until otherwise ruled by Lord Macclesfield in an anonymous case. 2 P. Wms. 86. If exceptions were taken to the sufficiency of an answer, not sworn to, as a pleading, the defendant, by adding the general traverse, would cover the defect, and nothing would be gained. Miller v. Avery, 2 Barb. Ch. (N. Y.) 590. Exceptions of this character would, consequently, be of no advantage, and are never made." Notwithstanding plaintiff's statutory right to examine defendant as a witness upon all matters in issue, the court will require defendant to answer interrogatories within proper limits, because evidence thus put in the pleadings is of more advantage to the plaintiff than when contained in depositions. Slater v. Banwell, 50 Fed. 150. But compare the following holdings in a later case: "An answer to a bill in equity, which fairly meets all allegations of the bill required for sufficiency as a pleading, need not admit or deny every detail of evidence alleged in the bill, so as to save the complainant the necessity of proof." Field v. Hastings & Bradley Co., 65 Fed. 279. "Since parties have been made competent as witnesses, the answer to a bill in equity is no longer required to conform to the old rules as to the sufficiency of an answer to a bill of discovery." Id. In this case, however, answer under oath was waived, and consequently the answer was to be regarded as a mere pleading, no discovery being called for.

[4] Mitf. Eq. Pl. (Jeremy's Ed.) §§ 309, 310. See Woods v. Morrell, 1 Johns. Ch. (N. Y.) 103; Hagthorp v. Hook's Adm'rs, 1 Gill & J. (Md.) 270; Cuyler v. Bogert, 3 Paige (N. Y.) 186.

[5] Van Cortlandt v. Beekman, 6 Paige (N. Y.) 492.

fraud of the defendant's grantor must not deny generally any notice of the fraud charged, but the facts must be denied specially and particularly, as charged in the bill;[6] and so, where a bill required a general account, and also called for a discovery as to whether the defendant had received certain specified sums of money, with the circumstances as to the times when, and from whom and on what account, such sums had been received, it was held that a general account, by way of schedule to the answer, referred to therein as containing a full account of all moneys received by the defendant, was not sufficient, and a specific answer was required.[7] Again, a complainant is entitled to an answer, not only to the interrogatories upon the main charges in the bill, but also to one founded on a statement which is merely evidence in support of such charges.[8]

The binding force of the rule upon the defendant is not affected by the fact that the bill contains no special interrogatory as to a matter in regard to which it calls upon the defendant, and which is material to the complainant's case;[9] but it is subject to certain limitations, aside from the exceptions to be hereafter noticed. Thus, the defendant is not bound to answer a mere arithmetical proposition;[10] nor, if there is no interrogatory requiring it, a mere recital;[11] nor interrogatories based upon a mere suggestion or a hypothetical statement in the bill,[12]— the right of the complainant to a discovery extending only to interrogatories founded upon the bill, and where such discovery is necessary to ascertain facts material to his case and essential to his obtaining a decree against the defendant individually.[13]

[6] Wood v. Mann, 1 Sumn. 506, Fed. Cas. No. 17,951.

[7] Hepburn v. Durand, 1 Brown, Ch. 503. See, also, Gordon's Adm'x v. Hammell, 19 N. J. Eq. 216.

[8] Mechanics' Bank v. Levy, 3 Paige (N. Y.) 606.

[9] Tucker v. Railroad Co., 21 N. H. 29.

[10] McIntyre v. Trustees, 6 Paige (N. Y.) 239.

[11] Mechanics' Bank v. Levy, 3 Paige (N. Y.) 606; McIntyre v. Trustees, 6 Paige (N. Y.) 239. The defendant in a bill in equity is not required to answer matters of recital, unless specially interrogated thereto, and, if he volunteers to answer such matters in part, he is not thereby bound to answer the whole. Newhall v. Hobbs, 3 Cush. (Mass.) 274.

[12] Grim v. Wheeler, 3 Edw. Ch. (N. Y.) 334.

[13] Story, Eq. Pl. § 853; post, p. 511, the exception on the ground of immate-

Answer upon Information and Belief.

For the purpose of a further explanation of the scope of the rule under consideration, it might be stated thus: That a defendant who submits to answer must answer fully, and such answer must be positive and direct as to all matters within his own knowledge, but otherwise upon information and belief; the object of the rule being to compel an answer of some sort,[14] since mere silence by the defendant, unless as to facts which the bill expressly charges to be within his knowledge, will not generally operate as an admission in favor of the complainant.[15] The rule on this point, as stated by Judge Story, is that if a fact is charged which is within the defendant's own knowledge, as if it is done by himself, he must answer positively,[16] at least if it is stated to have happened within six years; but, as to facts which have not happened within his own knowledge, he must answer as to his information and belief,[17] and the answer must be as to both, and not as to information merely

riality. See, also, Agar v. Canal Co., Coop. 212, 215; Jodrell v. Slaney, 10 Beav. 225; Kuypers v. Dutch Church, 6 Paige (N. Y.) 570.

[14] Story, Eq. Pl. § 854. See Devereaux v. Cooper, 11 Vt. 103; Arline v. Miller, 22 Ga. 330; Grady v. Robinson, 28 Ala. 289; Cleghorn v. Rutherford, 26 Ga. 152; Reed v. Insurance Co., 36 N. J. Eq. 146; Utica Ins. Co. v. Lynch, 3 Paige (N. Y.) 210; Robinson v. Woodgate, 3 Edw. Ch. (N. Y.) 422. A defendant in equity must answer as to his knowledge, remembrance, information, and belief. If a fact is charged as within his personal knowledge, he must answer positively, and not as to his remembrance or belief. If not within his knowledge, he must answer as to his information and belief. And he must answer directly and without evasion, not only literally as to the several matters charged, but the substance of each charge must be answered. A general denial is not sufficient, but there must be an answer to all the special circumstances and particular inquiries. Miles v. Miles, 27 N. H. 440.

[15] Post, p. 517.

[16] Story, Eq. Pl. § 854; Woods v. Morrell, 1 Johns. Ch. (N. Y.) 103, 107; Mead v. Day, 54 Miss. 58; Miles v. Miles, 27 N. H. 440. A general answer of denial to a general allegation in the bill, without specifying the facts upon which it is founded, is sufficient. Cowles v. Carter, 4 Ired. Eq. (N. C.) 105. But a general denial to a particular charge will not do. White v. Williams, 8 Ves. 193; Faulder v. Stuart, 11 Ves. 296.

[17] Story, Eq. Pl. §§ 854, 855. See Carey v. Jones, 8 Ga. 516; Dinsmoor v. Hazelton, 22 N. H. 535; Kittredge v. Bank, 3 Story, 590, Fed. Cas. No. 7,838; Bailey v. Wilson, 1 Dev. & B. Eq. (N. C.) 182; Woods v. Morrell, 1 Johns. Ch. (N. Y.) 104; Grimstone v. Carter, 3 Paige (N. Y.) 421.

without stating any belief.[18] It seems that the precise words, "information and belief," are not indispensable, as equivalent expressions, such as that he is unable to answer as to his "belief or otherwise," have been held sufficient;[19] and it seems also that a statement that he is an utter stranger to the facts as to which he is called on to answer will amount to a sufficient showing of want of information.[20] An answer denying the facts "according to his recollection and belief" has been held insufficient;[21] and so where the answer simply denied that the defendant had any knowledge of the facts stated in the bill, without also stating that he had no information or belief concerning them;[22] and the same is true where the answer states that he has no knowledge, information, recollection, or belief except as derived from the statements in the bill,[23] or "no knowledge whatever, except what is derived from the allegations in the bill."[24] In some cases, where the defendant is called upon for his knowledge or information as to facts, he may be required to go further, and state the knowledge or information de-

[18] Story, Eq. Pl. § 854. See The Holladay Case, 27 Fed. 830; Carey v. Jones, 8 Ga. 516; Sanderlin v. Sanderlin, 24 Ga. 583; Kinnaman v. Henry, 6 N. J. Eq. 90; Woods v. Morrell, 1 Johns. Ch. (N. Y.) 104; Smith v. Lasher, 5 Johns. Ch. (N. Y.) 247; Brooks v. Byam, 1 Story, 296, Fed. Cas. No. 1,947; Miles v. Miles, 27 N. H. 440; Rienzle v. Barker (N. J. Ch.) 4 Atl. 309; Reed v. Insurance Co., 36 N. J. Eq. 146; Hall v. Wood, 1 Paige (N. Y.) 404; Clark v. Jones, 41 Ala. 349; Grady v. Robinson, 28 Ala. 289.

[19] 1 Daniell, Ch. Pl. & Prac. § 723. See King v. Ray, 11 Paige (N. Y.) 235; Brooks v. Byam, 1 Story, 296, Fed. Cas. No. 1,947. See, also, Cuyler v. Bogert, 3 Paige (N. Y.) 186; Heartt v. Corning, 3 Paige (N. Y.) 566; Woods v. Morrell, 1 Johns. Ch. (N. Y.) 103.

[20] Amhurst v. King, 2 Sim. & S. 183. See Neale v. Hagthrop, 3 Bland (Md.) 551; Hagthorp v. Hook's Adm'rs, 1 Gill & J. (Md.) 270. But see Smith v. Lasher, 5 Johns. Ch. (N. Y.) 247.

[21] Taylor v. Luther, 2 Sumn. 228, Fed. Cas. No. 13,796.

[22] Bradford v. Geiss, 4 Wash. C. C. 513, Fed. Cas. No. 1,768. Cf. Clark v. Jones, 41 Ala. 349; Grady v. Robinson, 28 Ala. 289; Smilie v. Siler's Adm'r, 35 Ala. 88.

[23] Sloan v. Little, 3 Paige (N. Y.) 103. Where defendant denies all knowledge of a fact charged in the bill, but admits his belief, it is not necessary for him to deny any information on the subject. Davis v. Mapes, 2 Paige (N. Y.) 105.

[24] President, etc., of Tradesmen's Bank v. Hyatt, 2 Edw. Ch. (N. Y.) 195. See Norton v. Warner, 3 Edw. Ch. (N. Y.) 106.

rived from others;[25] and, in a case where the facts in question have passed between himself and his agent, to make inquiries in regard thereto before answering.[26]

The Exceptions—Scandal, Impertinence, Etc.

We have already noticed the rules forbidding scandal, impertinence, and the allegation of irrelevant and immaterial matters in the bill;[27] and, as such matters are not proper for the complainant to state as material to his case, so, if alleged, he has no right to require an answer to them, and the defendant therefore need not answer.[28] So, if the bill contains immaterial and irrelevant matter, either in the shape of allegations or interrogatories, the defendant need not answer. A test in the former case would be whether the allegations were such as the complainant must prove to entitle himself to the relief sought;[29] and one adopted in the case of interrogatories is to ascertain whether, if the defendant should answer in the affirmative, the admission would be of any service or aid to the complainant, either to assist his equity, or to advance his claim to relief,—that is, whether the discovery of the matters charged is necessary to ascertain facts material to the complainant's case, and to enable him to obtain a decree.[30]

Same—Incriminating Answer—Liability to Penalty or Forfeiture.

In explaining the nature of a demurrer to interrogatories, in an earlier part of this work, we have noticed that a witness under examination may decline to answer a question when the answer might

[25] Kittredge v. Bank, 1 Woodb. & M. 244, Fed. Cas. No. 7,859. See, also, Attorney General v. Rees, 12 Beav. 50; Glengall v. Edwards, 2 Younge & C. Exch. 125; Hall v. Wood, 1 Paige (N. Y.) 404.

[26] Earl of Glengall v. Frazer, 2 Hare, 99.

[27] Ante, c. 4, p. 319.

[28] Story, Eq. Pl. § 846; Agar v. Canal Co., Coop. 212; Utica Ins. Co. v. Lynch, 3 Paige (N. Y.) 210; Wiswall v. Wandell, 3 Barb. Ch. (N. Y.) 312; Brown v. Fuller, 13 N. J. Eq. 271; Hogencamp v. Ackerman, 10 N. J. Eq. 267. Where irrelevancy is made a ground for refusing to answer a part, it must appear that an answer to such part would, in no aspect of a complainant's case as made by the bill, be of service to him. Gilkey v. Paige, Walk. (Mich.) 520.

[29] Ante, c. 4, p. 320; Agar v. Canal Co., Coop. 212.

[30] See Jodrell v. Slaney, 10 Beav. 225; Kuypers v. Reformed Dutch Church, 6 Paige (N. Y.) 570; Daw v. Eley, 2 Hem. & M. 725; Attorney General v. Whorwood, 1 Ves. Sr. 534, 538.

subject him to some legal penalty, stating the grounds of his refusal, and the matter being determined by the court when the testimony is brought before it.[31] The same rule and immunity applies where the defendant is called on to answer the bill; and, in framing his discovery, he may decline to answer any interrogatory when the answer, if given, might subject him to a criminal prosecution, or cause him to incur any pains, penalties, or forfeitures.[32] Thus, a defendant to a bill in equity is not bound to answer a charge of having entered into a conspiracy to defraud the complainants by means of forgeries, and of having obtained money by forged drafts or checks.[33] But although he is not bound to criminate himself, or to supply any link in the evidence by which a criminal accusation can be sustained against him, he may be compelled, in answer to a charge of fraud, to discover any act not amounting to a public offense, or an indictable crime, although it may be one of great moral turpitude.[34]

If the defendant means to rely on this objection, he should set it up as a special ground for refusing the particular discovery,[35] either by demurrer, if the objection appears on the face of the bill,[36] or by plea, where it does not;[37] and he has also been permitted, when not choosing to protect himself by either of these methods, to insist,

[31] Ante, c. 3, p. 139.

[32] Wolf v. Wolf's Ex'r, 2 Har. & G. (Md.) 382; Leigh v. Everheart, 4 T. B. Mon. (Ky.) 379; Dwinal v. Smith, 25 Me. 379; Livingston v. Tompkins, 4 Johns. Ch. (N. Y.) 415; Northwestern Bank v. Nelson, 1 Grat. (Va.) 108; Adams v. Porter, 1 Cush. (Mass.) 170; Livingston v. Harris, 3 Paige (N. Y.) 528; Union Bank v. Barker, 3 Barb. Ch. (N. Y.) 358; Leggett v. Postley, 2 Paige (N. Y.) 599; Skinner v. Judson, 8 Conn. 528. The defendant, in a bill of discovery, is not bound to answer any interrogatories which may be used as evidence against him on a criminal charge. Adams v. Porter (1848) 1 Cush. (Mass.) 170. A bill charging a defendant with forgery should not call upon him to answer to such charge. Kibby v. Kibby, Wright (Ohio) 607.

[33] Union Bank v. Barker, 3 Barb. Ch. (N. Y.) 358. See, also, ante, c. 6, p. 401. The refunding of money received on a stock-jobbing transaction is not such a forfeiture as will excuse a defendant, liable to refund, from answering, under oath, in relation to such transaction. Gram v. Stebbins, 6 Paige (N. Y.) 124. See, also, Attwood v. Coe, 4 Sandf. Ch. (N. Y.) 412.

[34] Foss v. Haynes, 31 Me. 81.

[35] Sloman v. Kelly, 3 Younge & C. 673.

[36] Ante, c. 6, p. 401. [37] Ante, c. 7, p. 479.

by way of answer, that he is not obliged to make the discovery.[38] In any case, to bring the defendant within the rule, it must clearly appear by the pleadings that such a consequence will follow, or he will be compelled to answer.[39]

Same—Breach of Professional Confidence.

A further exception to the general rule as to answering fully exists in cases where the answer called for would involve the discovery of facts the knowledge of which has been derived by the defendant through confidence reposed in him in a professional capacity, such as counsel, or as a physician, and which it is the policy of the law to preserve inviolate.[40] The nature and extent of this objection have already been explained in connection with the demurrer to interrogatories,[41] and in stating the grounds for the use of the demurrer[42] and plea[43] when opposed to discovery, and require no further mention here.

Same—Discovery of Defendant's Own Title.

As a complainant is only entitled to a discovery of what pertains to, or is necessary to, support his own title, and has no right to pry into that of the defendant,[44] a further exception to the rule requiring a full answer is recognized where the bill seeks a discovery of the facts of the defendant's title, since he has, in general, a right to resist any inquiries which call upon him to disclose the nature

[38] Story, Eq. Pl. § 846. A mere statement in argument by defendant's counsel of a reason for declining to answer an interrogatory is not sufficient; the facts which entitle him to protection from answering must be fully stated in the answer. Slater v. Banwell, 50 Fed. 150.

[39] Wolf v. Wolf's Ex'r, 2 Har. & G. (Md.) 382; Leigh v. Everheart, 4 T. B. Mon. (Ky.) 379; Dwinal v. Smith, 25 Me. 379; Legoux v. Wante, 3 Har. & J. (Md.) 184; Livingston v. Tompkins, 4 Johns. Ch. (N. Y.) 415.

[40] Story, Eq. Pl. § 846. See Stratford v. Hogan, 2 Ball & B. 164; Greenough v. Gaskell, 1 Mylne & K. 98; Jones v. Pugh, 12 Sim. 470.

[41] Ante, c. 3, p. 139.

[42] Ante, c. 6, p. 401.

[43] Ante, c. 7, p. 479.

[44] See Lady Shaftsbury v. Arrowsmith, 4 Ves. 67, 71; Adams v. Fisher, 3 Mylne & C. 526; Buden v. Dore, 2 Ves. Sr. 445; Bolton v. Liverpool, 1 Mylne & K. 88; Bellwood v. Wetherell, 1 Younge & C. Exch. 211; Stainton v. Chadwick, 3 Macn. & G. 575; Bellows v. Stone, 18 N. H. 465; Cullison v. Bossom, 1 Md. Ch. 95; Howell v. Ashmore, 9 N. J. Eq. 82.

and character of his own title to the subject-matter of the controversy.[45] Thus, where a bill was filed by an heir, ex parte materna, against a general devisee and executor claiming under the testator, and seeking a discovery as to the title of the latter, and the particulars of the pedigree, a demurrer was allowed,[46] and, upon the same principle, an answer would have been sustained.[47]

Effect of the Equity Rules.

The general rule of equity pleading which we have just considered has been modified by the forty-fourth equity rule, which is almost a complete re-enactment of one of the English orders in chancery, and also by the thirty-ninth rule. The first of these rules provides that "a defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer." The effect of this rule is therefore to excuse a defendant from answering any interrogatory which appears upon its face to be open to any of the grounds of demurrer which we have noticed,[48] and at the same time permit him to answer as to the rest of the bill.

The thirty-ninth rule goes much further, providing that "the rule that, if the defendant submits to answer, he shall answer fully to all matters of the bill, shall no longer apply in cases where he might

[45] Story, Eq. Pl. § 572. But see Kimberly v. Sells, 3 Johns. Ch. (N. Y.) 467, 472. The rule of the English courts of equity, that the plaintiff in a bill of discovery "shall only have a discovery of what is necessary to his own title, and shall not pry into the title of the defendant" (Coop. Eq. Pl. 58), is not applicable in this commonwealth. Adams v. Porter (1848) 1 Cush. (Mass.) 170. Cf. Wilson v. Webber, 2 Gray (Mass.) 558; Haskell v. Haskell, 3 Cush. (Mass.) 540.

[46] Story, Eq. Pl. § 573; Ivy v. Kekewick, 2 Ves. Jr. 679. And see, also, the cases cited under note 3, supra, and as to the same ground when presented by demurrer (ante, c. 6, p. 403), and by plea (ante, c. 7, p. 479), as the method of objection does not affect the rule.

[47] See Buden v. Dore, 2 Ves. Sr. 445; Stainton v. Chadwick, 3 Macn. & G. 575. See, also, Downie v. Nettleton, 61 Conn. 593, 24 Atl. 977; Norfolk & W. R. Co. v. Postal Tel. Cable Co., 88 Va. 932, 14 S. E. 689.

[48] Ante, c. 6, pp. 400–404. Under the thirty-ninth equity rule, when a defendant sets up in his answer the bar of the statute of limitations, and the same is well

by plea protect himself from such answer and discovery; and the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form), in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer

pleaded, he is thereby excused from further answer to such parts of the bill as are covered by it. Samples v. Bank, 1 Woods, 523, Fed. Cas No. 12,278. The thirty-ninth equity rule was construed in Gaines v. Agnelly, 1 Woods, 238, Fed. Cas. No. 5,173. The following is a portion of the syllabus of that case:

"The well-known rule of chancery pleading, that if a defendant submits to answer he shall answer fully to all matters of the bill, is abrogated, in cases where the defendant might by plea protect himself from such answer and discovery, and in his answer sets forth the matter of such plea as a bar to the merits of the bill, by the thirty-ninth rule in equity established by the supreme court of the United States.

"Under the old equity practice, if a plea in bar was filed, and issue taken upon it, and that issue decided in complainant's favor, he was entitled to a decree without proving the allegations of his bill. If the same matters were set up in an answer, he was obliged to prove his bill; but in aid of such proof he was entitled to defendant's answer to the whole bill.

"The new rule in equity practice (the thirty-ninth) which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves the complainant under the burden of proving his bill, and takes from him the benefit of the defendant's answer; but the defendant is liable to be called as a witness in the cause.

"Under the new rule in equity (thirty-ninth), where the answer sets up a bar to the whole bill, and claims the benefit of it, as a plea in bar, it is no longer a ground of exception that it does not fully answer the allegations of the bill.

"If the bar set up in the answer and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer only, or file a replication and proceed to proofs according to the exigencies of the case.

"If the bar set up in the answer be insufficient as such, the complainant would be entitled to except as for want of a full answer; and, to avoid answering the exceptions, the defendant in such case would require leave of the court before he could amend the bar. If, instead of excepting, the complainant should go to proof, the burden would be on him to prove his bill, and on the defendant to prove his bar, each being entitled to examine the other as a witness. If, however, he should set the cause down for hearing on bill and answer only, the answer would have to be taken as true, and the bar therein as proved; and, though insufficient as a defense, the complainant could not have a decree, unless the

any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a bona fide purchaser for a valuable consideration, without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea." In its effect, this rule allows defenses to be made by answer that were before, by reason of the existence of the general rule, either impossible or unsafe because the full answer required would destroy their effect, by permitting such defenses to be asserted in the same manner as by a plea and answer,[49] but with the limitation that these defenses shall be only such as are available to bar the suit, and shall not include those which are properly the subject of pleas in abatement, such as objections to the jurisdiction, or to the parties, or to the form of the bill. The general rule is not

answer admitted the allegations of the bill on which the prayer for relief was founded. [Cited in McClaskey v. Barr, 40 Fed. 563.]

"If the bar set up in the answer is a sufficient defense to the whole relief sought by the bill, it is immaterial whether the defendant answer the allegations of the bill or not. He is not bound to answer them, and the rule no longer applies that if the defendant does answer at all, even on matters outside of the bar, he must answer fully."

[49] See Gaines v. Agnelly, 1 Woods, 238, Fed. Cas. No. 5,173; Samples v. Bank, 1 Woods, 523, Fed. Cas. No. 12,278. "The twenty-third rule of this court for the regulation of equity practice in the circuit courts has been relied on to show that it is competent for the defendant, instead of filing a formal demurrer or plea, to insist on any special matter in his answer, and have the same benefit thereof as if he had pleaded the same matter, or had demurred to the bill. This rule is understood by us to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction, and especially to those founded on any personal disability, or personal character of the party suing, or to any pleas merely in abatement. In this respect it is merely affirmative of the general rule of the court of chancery, in which matters in abatement and to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea, and cannot be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue. Wood v. Mann, 1 Sumn. 506, Fed. Cas. No. 17,951." Livingston's Ex'x v. Story, 11 Pet. 351, 393. See, also, Ala. Code 1886, § 3440. Maryland Ch. Rule No. 23 is a copy of the thirty-ninth U. S. Eq. Rule.

affected, save as to defenses of the class mentioned, while the scope of the answer as a pleading is extended.

EFFECT OF INSUFFICIENCY IN ANSWER.

346. No rule of universal application, as to the effect of not answering fully, can be stated. In some jurisdictions it is held that an answer impliedly admits such material facts or allegations of the bill as it does not expressly admit or deny; in others, that the implication will be raised only where, in addition to the silence of the answer, the fact in question is either charged in the bill as being within the knowledge of the defendant, or is presumably so; but in a majority of instances the rule is that facts neither expressly admitted nor controverted by the answer must be proved.

347. Admissions in the answer are not for the purposes of the hearing only, but, whether express or implied, constitute evidence for the complainant, even where the answer is not under oath, provided the facts thus admitted are put in issue by the allegations of the bill.

The effect of a failure by the defendant to admit or deny all material allegations of the bill should not, it seems, amount to an admission of such as are not answered, considering the answer according to its nature and object, as, unlike the demurrer, it does not admit the facts stated in the bill, and rest the defense upon a proposition of law, nor, as in the case of the plea, does it oppose the complainant's case upon a single material point, assuming as true all those parts to which it is not directed. As stated by Prof. Langdell: "As there is no constructive admission by answer, there can be none by failing to answer." [1] But, while this is theoretically true,

§§ 346–347. [1] Langd. Eq. Pl. § 84. Nothing is regarded as admitted by an answer in chancery, unless expressly admitted. Morris v. Morris, 5 Mich. 171; Morris v. Hoyt, 11 Mich. 8; Young v. McKee, 13 Mich. 552, 553; Hardwick v. Bassett, 25 Mich. 149.

the rulings of the different courts of equity in this country on the question are not in harmony. In most of the states and in the federal courts the rule holds good, and all material allegations of the bill, which the answer neither expressly admits nor denies,—that is, which it fails to answer,—must be proved;[2] but in other states, as in New Jersey[3] and New Hampshire,[4] the failure to answer is an admission of the fact or allegation in question; and in still others, as in Alabama,[5] Mississippi,[6] and Kentucky,[7] it has been held that, in case of such failure, facts not answered are admitted which are expressly charged in the bill as being within the knowledge of the defendant, or as to which his knowledge may fairly be presumed.[8] But, even if facts are thus charged as within the defendant's knowledge, there will be no implied admission if, from the nature of things, there can be no reasonable presumption that such is the fact.[9] Where allegations are answered generally and evasively, it seems that they are not thereby admitted,[10] though the contrary has been held.[11]

[2] See Glos v. Randolph, 133 Ill. 197, 24 N. E. 426; Cushman v. Bonfield, 139 Ill. 219, 28 N. E. 937; Smith v. Ewing, 23 Fed. 741, 746; Mead v. Day, 54 Miss. 58; Tate v. Connor, 2 Dev. Eq. (N. C.) 224, 227; Smith v. Insurance Co., 2 Tenn. Ch. 599, 602; Brooks v. Byam, 1 Story, 296, Fed. Cas. No. 1,947; Warner v. Dove, 33 Md. 579; Young v. Grundy, 6 Cranch, 51; Brockway v. Copp, 3 Paige (N. Y.) 539; Hardwick v. Bassett, 25 Mich. 149; Litch v. Clinch, 136 Ill. 410, 26 N. E. 579.

[3] Sanborn v. Adair, 29 N. J. Eq. 338; Lee v. Stiger, 30 N. J. Eq. 610.

[4] Ch. Rule 8, 38 N. H. 606.

[5] Lyon v. Bolling, 14 Ala. 753; Clark v. Jones, 41 Ala. 349.

[6] McAllister v. Clopton, 51 Miss. 257; Mead v. Day, 54 Miss. 58.

[7] Moore v. Lockett, 2 Bibb (Ky.) 67; Mitchell v. Maupin, 3 T. B. Mon. (Ky.) 185; Hutchison v. Sinclair, 7 T. B. Mon. (Ky.) 291.

[8] See Hardy v. Heard, 15 Ark. 184.

[9] Hardy v. Heard, 15 Ark. 184; Clark v. Jones, 41 Ala. 349; Moore v. Lockett, 2 Bibb (Ky.) 67; Neale v. Hagthrop, 3 Bland (Md.) 551. See Tate v. Conner, 2 Dev. Eq. (N. C.) 224.

[10] Clark v. Jones, 41 Ala. 349. But see Holmes v. State, 100 Ala. 291, 14 South. 51.

[11] McCampbell v. Gill, 4 J. J. Marsh. (Ky.) 87.

RESPONSIVENESS.

348. An answer, so far as it gives discovery, must be responsive, and not evasive. It must be full, direct, and sufficient so far as the inquiries of the bill extend. An answer will, in general, be responsive when it is confined to such facts as are necessarily required by the bill, and those that are inseparably connected with them, forming a part of the same transaction, including, in some cases, new or affirmative matter.

349. It has been considered a test of responsiveness whether, as a witness upon cross-examination, the defendant could be cross-examined as to the matter which he states in anticipation of his defense on a trial at law.

350. An answer not responsive is not only not evidence for defendant, but it is open to exception by the plaintiff, and, if the exceptions are sustained, a further answer may be required.

The general requisites of an answer, already mentioned, such as that it must be full, direct, and cover all the material allegations of the bill, are also in a measure indicative of what a responsive answer must be, though the particular quality seems to be the directness with which it meets the complainant's allegations.[1] An answer is strictly responsive to the bill only so far as it answers to a material statement or charge which the bill contains, as to which a disclosure is sought, and which is the subject of parol proof; and therefore, where a bill asks for the production of evidence which, from the nature of the complainant's case, he has a right to claim,

§§ 348–350. [1] An evasive answer is not responsive. Place v. City of Providence, 12 R. I. 1; Eaton's Appeal, 66 Pa. St. 483. An answer will be responsive in stating the particulars of a transaction charged and inquired into by the bill. Merritt v. Brown, 19 N. J. Eq. 286.

an answer which merely asserts the existence of the fact, without also stating the evidence of its existence, is not responsive.[2] So, where a bill alleged the making of a compromise agreement, and the answer goes into a history of the dispute compromised,[3] or where the bill sets forth an agreement, calling upon the defendant to admit or deny it, but not to state its terms, and the answer sets up a different agreement.[4] But where a bill stated an agreement, and the delivery of a bond sued upon, and the answer set up as a defense that persons whose signatures were a condition precedent to the delivery of the bond had not signed, the answer was held responsive.[5] And so where a bill charged that a release of a bond, conditioned for the support of the orator, was obtained by the defendant for a grossly inadequate sum, an answer denying the inadequacy, and setting forth the previous arrangements of the parties which led to the execution of the bond, the maintenance of the orator from that time to the cancellation of the bond, and the amount paid for the release, was held sufficient,[6] and an answer alleging a gift to a bill charging that a sum was loaned is sufficient.[7]

What portions of the answer are responsive to the bill must be

[2] Hagthorp v. Hook, 1 Gill & J. (Md.) 270.

[3] Sargent v. Larned, 2 Curt. 340, Fed. Cas. No. 12,364.

[4] Jones v. Belt, 2 Gill (Md.) 106. For further instances of answers not responsive, see the following cases: Blount v. Burrow, 4 Brown, Ch. 72, 75; Wells v. Houston, 37 Vt. 245; Sanborn v. Kittredge, 20 Vt. 632; Brewer v. Norcross, 17 N. J. Eq. 219; Roberts v. Birgess, 20 N. J. Eq. 139; Cummings v. McCullough, 5 Ala. 324; Manning v. Manning, 8 Ala. 138; Holabird v. Burr, 17 Conn. 556; Millerd v. Ramsdell, Har. (Mich.) 373; Harding v. Hawkins, 141 Ill. 572, 31 N. E. 307; Reid v. McCallister, 49 Fed. 16; Lewis v. Mason's Adm'r, 84 Va. 731, 10 S. E. 529; Ingersoll v. Stiger, 46 N. J. Eq. 511, 19 Atl. 842.

[5] Black v. Lamb, 12 N. J. Eq. 108. See, also, Bell v. Farmers' Deposit Nat. Bank, 131 Pa. St. 318, 18 Atl. 1079.

[6] Mann v. Betterly, 21 Vt. 326.

[7] Gleghorne v. Gleghorne, 118 Pa. St. 383, 11 Atl. 797. For illustrations of cases where answers have been held responsive, see Rowley's Appeal, 115 Pa. St. 150, 9 Atl. 329; Eaton's Appeal, 66 Pa. St. 483; Beals v. Railroad Co., 133 U. S. 290, 10 Sup. Ct. 314; Bell v. Bank, 131 Pa. St. 318, 18 Atl. 1079; Reid v. McCallister, 49 Fed. 16. See, also, Riegel v. Insurance Co., 153 Pa. St. 134, 25 Atl. 1070; Comstock v. Herron, 45 Fed. 660; Wingo v. Hardy, 94 Ala. 184, 10 South. 659.

determined by the bill, and not by the interrogatories, as the latter can neither limit nor extend the defendant's obligation to answer;[8] but it is difficult to state any precise rule.[9] It has been held, in New York, that the test as to whether the answer is responsive or not is whether the questions answered would be proper to ask a witness in a trial at law; that is, whether they would be relevant and such as the witness would be bound to answer, and the answers given would be competent testimony.[10] Again, it was held in New Hampshire that the general rule in equity that, where an allegation in the answer is responsive to the bill, a complainant, seeking to impeach the answer, must overcome it by something more than the testimony of a single witness, is not limited to matters in the answer which deny what is stated in the bill; and that there is no sound foundation for a distinction in this respect between matter of denial and matter of affirmance, if the latter is in relation to a particular as to which the bill requires an answer, the true distinction being between allegations as to those subjects upon which the bill requires some answer, and allegations of new matter, not stated or inquired of in the bill, but introduced by the defendant in his defense. In this case the test given is that, if the whole subject-matter of the statement or allegation in the answer might have been left out, then the allegations of the answer upon that subject are not responsive to the bill; but, if the omission of some statement upon that subject would furnish the complainant with just ground of exception to the answer, then the statement, to the extent to which it is required, and whatever its character, as affirmative or negative, is but a response to the requisition of the complainant.[11] Whatever may be the test adopted, it seems that the question must often be determined chiefly with reference to the allegations and inquiries of the bill and the statements of the answer, in the particular case; but it is clear that affirmative allegations by the defendant, as well as new matter, cannot well be responsive, unless plainly called for

[8] McDonald v. McDonald, 16 Vt. 630.

[9] See Dunham v. Gates, 1 Hoff. Ch. (N. Y.) 185.

[10] Dunham v. Gates, 1 Hoff. Ch. (N. Y.) 185, 189.

[11] Bellows v. Stone, 18 N. H. 465, 475.

by the bill, since the defendant cannot, by his sworn answer alone, avoid the necessity of establishing an independent defense by proof.[12]

[12] See Wells v. Houston, 37 Vt. 245, and the cases cited under note 7, p. 520. If a fact stated in the bill, and answered by defendant, is material to complainant's case, or is a circumstance from which a material fact may be inferred, the answer, in such a case, is responsive to the bill, and is evidence in the cause. Schwarz v. Wendell, Walk. (Mich.) 267. An answer which, while admitting or denying the facts in the bill, sets up other facts in defense or avoidance, is not evidence of the latter facts unless they are a direct and proper reply to an express charge or interrogatory; or unless the transaction is a continuous one, and the matters of charge and discharge occur at the same time. Beech v. Haynes, 1 Tenn. Ch. 569. The complainant may limit the charges of his bill and interrogatories so as to confine the responsive part of the answer, and, in that case, may use admissions which would be responsive except for the limitation, without being required to give the defendant the benefit of the matters of avoidance stated in connection therewith. Beech v. Haynes, supra. Another subsequent, independent, and distinct fact not stated in the bill is not responsive. If the whole allegation in the answer might have been left out, it is not responsive to the bill. If the omission of some statement would furnish ground of exception to the answer, the statement to the extent to which it is required, whether negative or affirmative, is responsive. Eaton's Appeal, 66 Pa. St. 483. A bill for account between partners averred that the plaintiff and two defendants had equal interests. One defendant answered that he had four-ninths, the plaintiff two-ninths, and the other partner three-ninths. The answer was responsive. When the plaintiff calls on the defendant to answer the allegations of the bill, he makes defendant a witness for that purpose, but for no other. The defendant is bound to set out whatever constitutes a part of the facts stated in the bill. The defendant cannot make himself by his answer a witness generally, and introduce other facts either in avoidance or defense. A test as to the answer being responsive is whether the respondent could, on cross-examination as a witness at law, be examined as to the matter he states in anticipation of his defense. Eaton's Appeal, supra. The effect of an answer responsive to a bill does not depend upon respondent's competency as a witness. Saffold v. Horne, 71 Miss. 762, 15 South. 639. Where a case is heard on bill and answer only, the allegations of the answer are taken as true, whether responsive to the bill or not. Huyck v. Bailey, 100 Mich. 223, 58 N. W. 1002; Kitchell v. Burgwin, 21 Ill. 40.

CHAPTER IX.

THE REPLICATION.

351–352. In General.

IN GENERAL.

351. The replication is a formal written pleading by the complainant, denying the truth of the matter set forth in the defendant's plea or answer, and affirming the truth of the matters stated in the bill.

352. Its effect is to fully put in issue the matter which the plea or answer sets forth. It is the last regular pleading in the series, and is available only to the complainant and in opposition to the plea or answer.

After the defendant has put in his answer, if the complainant does not except to the answer for insufficiency, nor deem it necessary to amend his bill, the usual course is for him to file a replication, which, as we have seen, is now the last pleading in the series in equity. This, as has been elsewhere noticed,[1] was formerly either general or special; the first being a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged to bar the complainant's suit, and an assertion of the truth and sufficiency of the bill, while the last contained, in addition, matter in avoidance of such new matter as the plea or answer set up as a defense.[2] If the general form was used, it closed the pleadings, but the use of the special form necessitated a rejoinder by the defendant,[3] which might be met by a surrejoinder by the complainant, and that by a rebutter by the defendant, as in the common-law system. Under the modern practice, the use of the special form is no

§§ 351–352. [1] Ante, c. 3, p. 98. [2] Story, Eq. Pl. § 878.
[3] Story, Eq. Pl. § 880.

longer allowed,[4] and the last pleading in equity is now the general formal denial and affirmance mentioned above.[5]

Effect of Replication to Answer.

Where a replication is filed to an answer, the complainant is thereby deemed to admit that the discovery given by the answer is suffi-

[4] McClane's Adm'x v. Shepherd's Ex'x, 21 N. J. Eq. 76. Special replications are prohibited by the forty-fifth equity rule, which permits the complainant in a proper case, and in the discretion of the court, to amend his bill. Mason v. Railroad Co., 10 Fed. 334. Matter in avoidance of matter set up in the answer can be put in issue only by proper anticipatory charges or by an amendment of the bill. White v. Morrison, 11 Ill. 361. See Storms v. Storms, 1 Edw. Ch. (N. Y.) 358; Cowart v. Perrine, 21 N. J. Eq. 101. A special replication, if filed, can be treated only as a general replication. Shaeffer v. Weed, 3 Gilman (Ill.) 511. Cf. Bryan v. Wash, 2 Gilman (Ill.) 557. A special replication, setting up new matter in avoidance, may be stricken out on motion. Mason v. Railroad Co., 10 Fed. 334. See, also, Vattier v. Hinde, 7 Pet. 253. No special replication is admissible, Newton v. Thayer, 17 Pick. (Mass.) 129; unless by leave of court, 16th Ch. Rule Sup. Jud. Ct., 104 Mass. 571.

[5] U. S. Eq. Rule 66 provides that, "in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue without any rejoinder or other pleading on either side." "The English practice of serving upon the defendant a subpœna to rejoin and of filing a rejoinder has never obtained in this country." Beach, Mod. Eq. Prac. § 471. A replication is presumed to be waived where the cause is submitted for decision on pleadings and proof without one, and the court hears proof without objection. Jones v. Neely, 72 Ill. 449. Cf. Webb v. Insurance Co., 5 Gilman (Ill.) 223; Jameson v. Conway, 5 Gilman (Ill.) 227; Chambers v. Rowe, 36 Ill. 171. Where parties proceed to trial without a replication, treating the cause as at issue, the court will treat it as if the issue were complete. Stark v. Hillibert, 19 Ill. 344. The replication being defective by reason of the transposition of parties therein, the court may permit a proper one to be filed, even after the cause has been submitted to the jury. Buckley v. Boutellier, 61 Ill. 293. Cf. Jameson v. Conway, 5 Gilman (Ill.) 227. Where the omission to reply was evidently inadvertent and from a mistaken view of the practice, the court did not dismiss the bill, but allowed the complainant to reply and introduce proofs on equitable terms. Hardwick v. Bassett, 25 Mich. 149. Where, by mistake, a replication has not been filed, and yet witnesses have been examined by defendant, the court will permit a replication to be filed nunc pro tunc. Brooks v. Mead, Walk. (Mich.) 389. Where a plea to a cross bill is not replied to, the facts therein set up are admitted, and the only question, where the cause is set for hearing on the plea, is as to its sufficiency. Knowlton v. Hanbury, 117 Ill. 471, 5 N. E. 581. Under rule 123, pro-

cient, and he cannot thereafter except to it for insufficiency.[6] So where the defense is made by both plea and answer to different parts of the bill, and the plea is replied to without argument, as to its sufficiency, he cannot thereafter except to the answer for insufficiency as regards that part of the bill opposed by the plea.[7] A replication, of course, does not admit the truth of the facts alleged in the answer. On the contrary, it prevents complainant from being precluded thereby, and gives him an opportunity to overcome the answer if he can. If he introduces no evidence, or insufficient evidence, the statement of the answer will prevail over the denial of the replication. The answer is prima facie true.[8] Neither does a replication admit the sufficiency in law of the answer as a defense.[9]

Effect of Replication to Plea.

According to strict practice, if the complainant replies to a plea without setting it down for argument, he thereby admits its sufficiency in law as a defense to so much of the bill as it opposes, and the only question is as to its truth. If the facts relied upon by the plea are proved, a dismissal of the bill at the hearing follows as a matter of course.[10] This strict practice no longer prevails, in the federal court at least. The thirty-third equity rule provides that, if the facts stated in a plea be found for the defendant, they shall avail him as far as in law and equity they ought to avail him.[11]

viding that a defendant may have all the benefits of a cross bill on an answer containing the proper averments and prayers, a general replication does not traverse a cross claim alleged in the answer, and defendant has a right to enter a default thereon, which may, however, be opened on a proper showing, at the court's discretion. Coach v. Kent Circuit Judge, 97 Mich. 563, 56 N. W. 937.

[6] Story, Eq. Pl. § 877; Fost. Fed. Prac. § 158; Beach, Mod. Eq. Prac. § 474; Hughes v. Blake, 6 Wheat. 453. See, also, McKim v. Mason, 2 Md. Ch. 510.

[7] See ante, p. 426.

[8] See ante, pp. 133, 579.

[9] Fost. Fed. Prac. § 158; Everts v. Agnes, 4 Wis. 343. See, also, ante, p. 138.

[10] Hughes v. Blake, 6 Wheat. 453, 472; Myers v. Dorr, 13 Blatchf. 22, Fed. Cas. No. 9,988; Cottle v. Krementz, 25 Fed. 494; Burrell v. Hackley, 35 Fed. 833; Rhode Island v. Massachusetts, 14 Pet. 210, 232; Tompkins v. Anthon, 4 Sandf. Ch. (N. Y.) 97, 120; Seebold v. Lockner, 30 Md. 133. But see Matthews v. Manufacturing Co., 2 Fed. 232.

[11] For construction of this rule, see cases cited supra, note 10; also ante, p. 428.

Form of General Replication.

(Title of Cause.)

The replication of A. B., Complainant, to the Answer of C. D., Defendant.

This repliant, saving and reserving unto himself all and all manner of benefit and advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is uncertain, evasive, and insufficient in law to be replied unto by this repliant; without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, avoided, traversed, or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed. E. F., Solicitor for Complainant.

TABLE OF CASES CITED.

[THE FIGURES REFER TO PAGES.]

A

——— v. Gwillim, 495.
v. Lake, 495.
Abbott v. Gregory, 200.
Abels v. Railroad Co., 308.
Abergottie v. Chaplin, 245.
Abraham v. Insurance Co., 73.
Adair v. Adair, 243.
v. New River Co., 24, 26.
Adam v. Iron Co., 247.
Adams v. Adams, 137.
v. Bradley, 31, 42.
v. Fisher, 403, 513.
v. Howard, 362.
v. Manning, 255.
v. Milling Co., 223, 225, 227.
v. Porter, 205, 403, 512, 514.
v. St. Leger, 31.
v. Sayre, 243.
v. Woods, 156.
Addison v. Walker, 343, 345.
Adelman's Estate, In re, 245.
Adkins v. Paul, 137.
Adler-Goldman Commission Co. v. Hathcock, 266.
Adlington v. Cann, 468.
Aetna Life Ins. Co. v. Finch, 239.
v. Smith, 286.
African M. E. Church v. Conover, 222.
Agar v. Canal Co., 509, 511.
Agawam Woolen Co. v. Jordan, 494.
Ager v. Murray, 274.
Aholtz v. Dorfee, 315.
v. Durfee, 313.
Ahrend v. Odiorne, 321, 329, 385, 399.
Aiken v. Smith, 156.
Aikin v. Ballard, 329.
v. Cassiday, 305.
Albany City Bank v. Dorr, 416.
Albergottie v. Chaplin, 245.
Albretcht v. Sussmann, 46, 184, 457.
Aldrich v. Boice, 252.
Aldridge v. Thompson, 280.
Alexander v. Alexander, 116.
v. Gibbon, 248.
Alexandra Palace Co., In re, 17.
Allan v. Allan, 197, 285.
Allen v. Allen, 307.
v. Car Co., 190, 225, 227.
v. Chambers, 262.
v. Coffman, 228.
v. Hawley, 106.
v. Hazen, 70.
v. Mayor, etc., 143.
v. O'Donald, 135.
v. Randolph, 434, 472.
v. Smith, 129.
v. Tritch, 307.
v. Turner, 54, 378.
v. Woodruff, 18, 224, 227, 463.
Aller v. Jones, 77.
Alley v. Nott, 382.
v. Quinter, 236.
Allin's Heirs v. Hall's Heirs, 17.
Allum v. Stockbridge, 226.
Allyn v. Davis, 70.
Almond v. Wilson, 346.
Alworth v. Seymour, 201.
American Bell Telephone Co. v. Southern Telephone Co., 272.
American Bible Soc. v. Hague, 88.
American Clay-Bird Co. v. Ligowski, 500.
American Dock & Improvement Co. v. Public School Trustees, 114, 115.
American Exchange Bank v. Inloes, 221.
American Freehold Land & Mortgage Co. v. Jefferson, 233.
v. Walker, 366.
American Wire Co. v. Brasher, 231.

[The figures refer to pages.]

American & General Mortg. & Inv. Corp. v. Marquam, 305.
Ames v. Franklinite Co., 306.
Ames v. Kansas, 45.
v. King, 213.
v. Weston, 73.
Amgerstein v. Clark, 26.
Amhurst v. King, 510.
Amory v. Lawrence, 497.
Amter v. Conlon, 253.
Amy v. Manning, 187, 216, 217.
Anderson v. Bank, 141.
v. De Soer, 224.
v. Harvey's Heirs, 121.
v. Henderson, 499.
v. Logan, 258.
v. Railroad Co., 127, 128.
v. Watt, 75.
v. Wilkinson, 280.
v. Wilson, 201, 236.
Anding v. Davis, 371.
Andrews v. Brown, 448.
v. Gilman, 306.
v. Hobson's Adm'r, 306.
v. Kibbee, 37, 306.
v. Smith, 88.
Androscoggin & K. R. Co. v. Androscoggin R. Co., 159.
Angel v. Hadden, 280.
Angell v. Angell, 284, 287.
v. Hadden, 278.
v. Haddon, 28.
v. Stone, 321.
Angerstein v. Clark, 26.
v. Clarke, 68.
Angus v. Robinson's Adm'r, 263.
Annin v. Annin, 224, 226.
Anon., 28, 427.
Appleton v. Horton, 134.
Apthorp v. Comstock, 116.
Archer v. Jones, 398.
v. Lumber Co., 258.
Arline v. Miller, 509.
Armengaud v. Coudert, 423.
Armitage v. Wadsworth, 410, 455.
Armitstead v. Durham, 325.
Armstrong v. Armstrong, 143.
v. Bank, 306.
v. Cooper, 153, 312.
v. Lear, 196.
v. Ross, 241.
v. Wilson, 500.
Arnold v. Kyle, 494.
v. Slaughter, 97.
v. Styles, 96.
Arrowsmith v. Rappelge, 156.
Artisans' Bank v. Treadwell, 156.
Ashmore v. Evans, 493.
Ashton v. Bank, 32.
Ashurst v. McKenzie, 251.
Askew v. Carr, 262.
Aspinwall v. Aspinwall, 306.
Atkins v. Billings, 20.
Atkinson v. Flannigan, 278.
v. Henshaw, 43.
v. Manks, 278, 280, 498.
v. Turner, 472.
Atlanta Real-Estate Co. v. Atlanta Nat. Bank, 34.
Atlantic, T. & O. R. Co. v. Carolina Nat. Bank, 468.
Attorney General v. Borough of Poole, 344.
v. Brown, 400.
v. Corporation of London, 403.
v. Earl of Chesterfield, 202.
v. Forbes, 124.
v. Foster, 300.
v. Goddard, 27.
v. Jackson, 368, 395, 463.
v. Jeanes, 221, 227.
v. Mayor, etc., of Borough of Poole, 345.
v. Merchant Tailors' Co., 346.
v. Oakland County Bank, 135.
v. Pearson, 75.
v. President, etc., of Oakland County Bank, 501.
v. Rees, 511.
v. Rickards, 352.
v. Scott, 221.
v. Vincent, 233.
v. Whorwood, 209, 214, 215, 511.
v. Wynne, 28.
Attwood v. Coe, 512.
v. Small, 137, 189.
Atwater v. Fowler, 135.
Atwill v. Ferrett, 365, 369, 401.
Austin v. Chambers, 189.
Avery v. Petten, 24.
v. Society, 257.
Ayers, In re, 22.
Aylwin v. Bray, 378.
Ayres v. Carver, 34, 35.

[The figures refer to pages.]

B

Babbitt v. Bowen, 240.
Babcock v. Eckler, 266.
Bacon v. Leslie, 262.
v. Rives, 37.
v. Robertson, 34.
Badeau v. Rogers, 278-280.
v. Tylee, 280.
Badger v. Badger, 477.
v. McNamara, 194.
Baent v. Kennicutt, 397.
Baggott v. Sawyer, 261.
Bagshaw v. Railroad Co., 34.
Bailey v. Bailey, 105.
v. Burton, 227, 228.
v. Collins, 119.
v. Inglee, 26.
v. Leroy, 413.
v. Ryder, 169, 189, 190.
v. Wilson, 501, 509.
Bailey Washing Mach. Co. v. Young, 218.
Bainbridge v. Burton, 34.
Baines v. M'Gee, 362.
Baird v. Jackson, 342.
Baisley v. Baisley, 76.
Baker v. Booker, 361.
v. Frellsen, 382.
v. Kingsland, 97.
v. Mellish, 373, 381.
v. Updike, 228.
v. Wetton, 327.
Baldwin v. McCrea, 470.
v. Mackown, 294, 405.
v. Peach, 477.
Balen v. Jacquelin, 247.
Ballance v. Loomis, 506.
v. Underhill, 305, 306, 308, 499.
Ballard v. Kennedy, 307, 495.
Ballou v. Inhabitants of Hopkinton, 52.
Balls v. Strutt, 122.
Bally v. Kenrick, 505.
Baltimore & O. R. Co. v. Arthur, 279, 280.
v. City of Wheeling, 496.
v. Hoge, 267.
Bampton v. Birchall, 302, 418.
Bancroft v. Sawin, 68.
Bangs v. Stephenson, 187.
v. Strong, 443.
Bank v. Loomis, 316.
v. Railroad Co., 56.
Bank of Commonwealth v. Hopkins, 469.
Bank of England v. Morice, 470.
Bank of Key West v. Navarro, 239.
Bank of Michigan v. Williams, 461.
Bank of North America v. Wheeler, 470.
Bank of St. Marys v. St. John, 85.
Bank of United States v. Beverly, 134
v. Ritchie, 54.
Bank of Utica v. Finch, 84.
v. Mersereau, 493.
v. Messereau, 505.
Banks v. Booth, 113.
v. Manchester, 138, 360.
Bannister v. Miller, 502.
Barber v. Barber, 366, 373.
Barbour v. Whitlock, 16.
Barefoot v. Fry, 125.
Baring v. Nash, 202, 247, 327, 328.
Barker v. Todd, 166.
v. Vernon Tp., 51, 253.
v. Walters, 34.
Barkworth v. Young, 329.
Barnes v. Gibbs, 470.
Barnesly v. Powel, 316, 317.
Barney v. Baltimore City, 14.
v. Latham, 19.
Barnum v. McDaniels, 311.
Barr v. Clayton, 193.
Barraque v. Manuel, 221, 222
Barrett v. Doughty, 372, 373.
Barrow v. Bailey, 275, 276.
v. Hunton, 312.
Barrows v. Baughman, 189, 190.
Barry v. Abbot, 360.
v. Insurance Co., 279.
v. McAvoy, 193.
Barstow v. Smith, 58, 371.
Bartee v. Tompkins, 347.
Barth v. Rosenfeld, 147.
Bartlett v. Bartlett, 197.
v. Gillard, 138.
Bartlette v. Crittenden, 121.
Barton v. Barton, 135.
v. Long, 398.
v. May, 243.
Barton Beach v. Cooke, 232.
Bass v. Gilliland, 263.
Bassett v. Manufacturing Co., 427, 432.
v. Nosworthy, 475.
v. Warner, 59.
Bateman v. Willoe, 211.

[The figures refer to pages.]

Bates v. Coe, 494.
v. Murphy, 499.
v. Wheeler, 231.
Bateson v. Choate, 161.
Battell v. Matot, 461.
Battelle v. Mill Co., 425.
Battle v. Street, 380.
Baxter v. Buchanan, 106.
v. Moses, 273.
Bay v. Cook, 266.
v. Shrader, 500.
Bayard's Appeal, 161.
Bayha v. Taylor, 250.
Baylee v. Brown, 365.
Bayless v. Glenn, 239.
Bayley v. Adams, 432, 438, 441, 466.
v. De Walkiers, 495.
v. Greenleaf, 475.
Bayzor v. Adams, 346.
Beal v. Chase, 120.
Beall v. Lehman-Durr Co., 370.
v. Taylor, 24.
Beals v. Railroad Co., 33, 98, 520.
Beam v. Bennett, 265.
Beard v. Bowler, 414, 423.
Beatty v. De Forest, 162.
v. Smith, 134.
Beauchamp v. Putnam, 307.
Beaumont v. Meredith, 42.
Bechtel v. Carslake, 123.
v. Sheafer, 278, 279.
Beck v. Beck, 360.
v. Stephani, 279.
Beckford v. Wade, 477.
Beckwith v. Manufacturing Co., 239.
Bedell v. Hoffman, 279, 280, 282.
Bedsole v. Monroe, 340.
Beebe v. Buxton, 242.
v. Power Co., 33.
v. Russell, 147.
Beech v. Haynes, 492, 522.
Beecher v. Anderson, 496.
v. Beecher, 230.
Beekman v. Cutter, 71.
v. Railway Co., 399.
Beene's Heirs v. Randall's Heirs, 135.
Beggs, In re, 146.
Behrens v. Pauli, 469.
v. Sieveking, 469.
Bein v. Heath, 48.
Belford v. Crane, 137, 498.
Belknap v. Stone, 216, 236.
v. Trimble, 52.
Bell v. Donohue, 22.
v. Farmers' Deposit Nat. Bank, 520.
v. Thompson, 231.
v. Woodward, 415, 432.
Bellamy v. Bellamy, 147.
Bellingham Bay Land Co. v. Dibble, 251.
Bellows v. Stone, 136, 513, 521.
Bellwood v. Wetherell, 484, 513.
Belt v. Bowie, 341.
Benfield v. Solomons, 406.
Benner v. Kendall, 249.
Bennet v. Lee, 314.
v. Vade, 228, 334, 335.
Benson v. Hadfield, 339, 347, 464.
v. Jones, 417, 435.
v. Wolverton, 299.
Bent v. Smith, 134.
Bentley v. Cowman, 353.
Berdanatti v. Sexton, 313.
Bergen v. Bennett, 243.
Bergmann v. Salmon, 226.
Berkley v. Ryder, 406.
Berry v. Askham, 24.
v. Stockwell, 312.
Bertine v. Varian, 494.
Bethel v. Robinson, 240.
Bettes v. Dana, 299, 483.
Bettison v. Farringdon, 126.
Betton v. Williams, 14.
Bevans v. Sullivan, 137.
Bickerdike v. Allen, 496.
Bickley v. Com., 160.
v. Dorrington, 202.
Bierne v. Ray, 498.
Bigelow v. Sanford, 378, 394.
Biggs v. Kouns, 281.
Bignall v. Atkins, 294.
Bignold v. Audland, 282.
Billing v. Flight, 411.
Billingslea v. Gilbert, 496.
Bingham v. Cabot, 185, 186.
Binney's Case, 496.
Birch v. Funk, 382.
Birchett v. Bolling, 261.
Birly's Ex'rs v. Staley, 335.
Birmingham v. Gallagher, 34, 35.
Bischoffsheim v. Brown, 126.
Bishop v. Bishop, 189, 191.
v. Insurance Co., 258.
Bissell v. Beckwith, 347.
v. Bozman, 501.

[The figures refer to pages.]

Black v. Black, 372, 399, 413, 467.
v. Lamb, 520.
v. Shreeve, 373.
Blair v. Steel Co., 305.
Blake v. Van Tilborg, 59.
Bland v. Fleeman, 14.
Blauvelt v. Smith, 162, 163.
Blease v. Burgh, 342.
Bliley v. Taylor, 105.
Blodgett v. Hobart, 307.
Blomfield v. Eyre, 230.
Blondheim v. Moore, 105.
Blount v. Burrow, 520.
Blue v. Watson, 282.
Blum v. Simpson, 266.
Board of Domestic Missions of German Reformed Church v. Von Puechelstein, 45.
Board of Education v. Scoville, 279.
Board of Sup'rs of Douglas Co. v. Wallbridge, 342.
Board of Sup'rs of Fulton Co. v. Mississippi & W. R. Co., 96, 506.
Board of Sup'rs of Henry Co. v. Winnebago Swamp Drainage Co., 398.
Board of Sup'rs of Whiteside Co. v. Burchell, 393.
Board, etc., of German Reformed Church in America v. Von Puechelstein, 391.
Bobb v. Bobb, 59, 346.
Boddy v. Kent, 298.
Bogan v. Camp, 201.
Bogardus v. Trinity Church, 413, 424, 440–442, 493.
Bogert v. Bogert, 127.
Bolgiano v. Cooke, 329.
Bolman v. Lohman, 104.
Bolton v. Gardner, 438, 443, 466. 472, 473.
v. Liverpool, 513.
v. Liverpool Corp., 17, 141, 403.
Bolware v. Craig, 221.
Bond v. Connelly, 18.
v. Hendricks, 234.
v. Howell, 84.
v. Jones, 362.
Bonesteel v. Bonesteel, 128.
Bonker v. Charlesworth, 51.
Bonner v. Proprietors of Kennebeck Purchase, 247.
Bonney v. Stoughton, 398.
Boon v. Pierpont, 368, 394.
Boone v. Boone, 245.
v. Chiles, 404, 475, 476, 494.
Booth v. Stamper, 381.
v. Thompson, 190.
v. Wiley, 102, 252.
Borden v. Curtis, 263.
Borders v. Murphy, 493.
Born v. Schrenkeisen, 259.
Borst v. Simpson, 250.
Bosanquet v. Marsham, 381.
Boslay v. Susquehanna Canal, 123.
Boston Water-Power Co. v. Boston & W. R. Corp., 388.
Boston Woolen-Hose Co. v. Star Rubber Co., 18.
Bostwick v. Brinkerhoff, 149.
Botsford v. Beers, 199, 211.
Bourke v. Amison, 72.
v. Callanan, 114, 116.
Boussmaker, Ex parte, 46.
Bouton v. City of Brooklyn, 44.
Bowden v. Achor, 58.
v. Bland, 259.
v. Johnson, 136.
Bowen v. Idley, 101.
Bower Barff Rustless-Iron Co. v. Wells Rustless-Iron Co., 96.
Bowers v. Keesecher, 59.
v. Smith, 47.
Bowes v. Fernie, 127.
Bowie v. Minter, 47, 293, 295.
Bowles v. McAllen, 16.
v. Orr, 470.
Bowser v. Hughes, 457.
Bowyer v. Covert, 44.
Boyd, Ex parte, 288.
v. Clements, 101.
v. Hawkins, 98.
v. Parker, 239.
v. Sims, 381.
Boyden v. Partridge, 32.
Boyer v. Chandler, 23.
Boyle v. Zacharie, 6–8.
Bradford v. Geiss, 510.
Bradley v. Morgan, 31.
v. Webb, 135.
Bradshaw v. Callaghan, 246, 248.
v. Garrett, 314.
Bradstreet v. Insurance Co., 470.
Brady v. McCosker, 302.
Bragg v. Greenleaf, 73.
Brainerd v. Arnold, 190, 320.
Bramston v. Carter, 68.

[The figures refer to pages.]

Branch Bank of Mobile v. Strother, 233.
Brandlyn v. Ord, 471.
Brandon v. Cabiness, 189.
Brandon Manuf'g Co. v. Prime, 307, 371.
Brant v. Gallup, 157.
Brantingham v. Brantingham, 190.
Brasher v. Van Cortlandt, 41, 234.
Bremer v. Dock Co., 243.
Brereton v. Gamul, 432, 440.
Brewer v. Ass'n, 27.
v. Norcross, 520.
Brewster v. Wakefield, 40.
Briant v. Corpening, 187, 320.
Brice v. Brice, 228.
Bridger v. Thrasher, 325.
Brien v. Buttorff, 366.
Briges v. Sperry, 247.
Briggs v. Stroud, 416.
v. The Light Boats, 55.
Brill v. Stiles, 362, 365.
Brinckerhoff v. Lansing, 125.
Brinkerhoff v. Brown, 53, 274, 275, 339, 345, 498.
Bristol v. Johnson, 51.
Brittin v. Crabtree, 135.
Brock v. Dole, 120.
Brockett v. Brockett, 157.
Brockway v. Copp, 518.
Bromberg v. Heyer, 355.
Bromley v. Smith, 44.
Brooke v. Hewitt, 332, 393.
Brookes v. Burt, 57.
v. Whitworth, 346.
Brooks v. Brooke, 291.
v. Byam, 96, 97, 510, 518.
v. Gibbons, 373, 374.
v. Mead, 524.
Brown v. Brown, 246.
v. Bulkley, 135, 136.
v. Coal Co., 145, 245.
v. Dowthwaite, 28.
v. Fuller, 274, 511.
v. Improvement Co., 229.
v. Lawton, 50.
v. McDonald, 222, 224.
v. Miner, 224.
v. Mortgage Co., 96, 360, 506.
v. Railroad Co., 470.
v. Ricketts, 34, 98.
v. Safe-Deposit Co., 341.
v. Shearon, 239.
v. Solary, 23, 58.
Brown v. Sutton, 263.
v. White, 315.
Brownell v. Brownell, 247.
v. Curtis, 401, 451, 478.
Browning v. Pratt, 190.
Brownson v. Gifford, 52.
Brownsword v. Edwards, 195, 373, 425, 434.
Bruen v. Bruen, 362, 365.
Bruff v. Leder, 20.
Brumbaugh v. Richcreek, 268.
Brumly v. Society, 17.
Brundage v. Goodfellow, 82.
Brunner v. Bay City, 51.
Brush Electric Co. v. Electric Imp. Co., 147.
Bruton v. Rutland, 245.
Bryan v. Blythe, 340.
v. Kales, 397.
v. Wash, 524.
Bryant v. Bryant, 328.
Bryce v. Insurance Co., 257.
Buchanan v. Ford, 123.
v. Malins, 298.
Buchoz v. Lecour, 37.
Buck v. Buck, 292.
Buckeridge v. Glasse, 344.
Buckingham v. McLean, 158.
Buckley v. Boutellier, 524.
Buckner v. Abrahams, 17.
v. Sessions, 240.
Buden v. Dore, 513, 514.
Buel v. Street, 155.
Buerk v. Imhaeuser, 77, 236, 237, 385.
Buffington v. Harvey, 313.
Buffum's Case, 159.
Bugbee v. Sargent, 347.
Bulkeley v. Dunbar, 355.
Bull v. Meloney, 239, 240.
Bullock v. Adams, 221, 264.
v. Brown, 305.
v. Richardson, 214–216.
v. Sadlier, 476.
Bullwinker v. Ryker, 241, 248.
Buntain v. Wood, 498.
Burchard v. Boyce, 338.
Burdett v. Grew, 421.
Burgess v. Wheate, 406.
Burk v. Foundry Co., 372.
Burke v. Taylor, 267.
Burlington Bank v. Catlin, 70.
Burnett v. Anderson, 281.
v. Boyd, 225.

[The figures refer to pages.]

Burney v. Morgan, 299.
v. Ryle, 120.
Burns v. Lynde, 38.
Burpee v. Smith, 120, 370, 401.
Burrell, In re, 354.
v. Hackley, 525.
Burrows v. Jemineau, 125.
Burt v. Dennet, 31.
Burton v. Black, 278.
v. Platter, 267, 268.
Busby v. Littlefield, 202, 225, 226.
Bushnell v. Avery, 187, 188, 191.
Busick v. Van Ness, 493.
Butcher v. Jackson, 197.
Butler v. Archer, 263.
v. Burleson, 120.
v. Cunningham, 172.
v. Freeman, 105.
v. Gazzam, 344.
v. Kinzie, 83.
v. Railroad Co., 251.
v. Spann, 58.
Butterworth v. Hill, 71.
Button v. Frink, 332.
Buzard v. Houston, 9.
Byars v. Thompson, 261.

C

Cable v. Alvord, 128.
v. Ellis, 306.
Cadigan v. Brown, 51, 255.
Caines v. Fisher, 83.
Caldwell v. King, 334.
v. Montgomery, 398.
v. Taggart, 14, 19.
Calhoun v. Cozens, 119.
Calloway v. Dobson, 103.
Calverley v. Williams, 406.
Calverly v. Harper, 257, 259.
Camden-Horne Railroad Co. v. Citizens' Coach Co., 223.
Camden & A. R. Co. v. Stewart, 189, 349, 503.
Camden & A. R. & Transp. Co. v. Stewart, 156.
Cameron v. McRoberts, 39–41.
Camp v. Mills, 347.
Campau v. Chene, 397.
Campbell v. Benjamin, 499.
v. City of New York, 295.
v. Disney, 251–253.
Campbell v. Mackay, 344.
v. Morrison, 123, 233.
v. Powers, 187.
v. Routt, 305, 308.
v. Rust, 261.
v. Sheldon, 288.
v. Snyder, 312.
Canal Co. v. Gordon, 51.
Candee v. Lord, 98.
Candler v. Partington, 97.
Cannon v. McNab, 288.
Capehart v. Hale, 184.
Card v. Bird, 156.
Carew v. Johnston, 433
Carey v. Brown, 31.
v. Giles, 381.
v. Hoxey, 19, 43.
v. Jones, 509, 510.
v. Railroad Co., 18.
Carleton v. Leighton, 457.
Carlisle v. Cooper, 121.
v. Stevenson, 118.
Carlsbad v. Tibbetts, 235.
Carman v. Watson, 499.
Carmichael v. Browder, 341.
Carney v. Carney, 370.
v. Hadley, 256.
Carpenter v. Benson, 96.
v. Muchmore, 85.
Carr v. U. S., 55.
Carrigan v. Evans, 245.
Carrington v. Lentz, 357.
Carroll v. Bank, 289.
v. Potter, 416.
v. Richardson, 308.
v. Roosevelt, 347.
v. Waring, 367.
Carson v. Flowers, 138.
Carswell v. Walsh, 261.
Carter v. Carter, 134, 194.
v. Graves, 267.
v. Ingraham, 196, 235, 236.
v. Jennings, 299.
v. Jones, 30.
v. Kerr, 247.
v. Taylor, 245.
Cartledge v. Cutliff, 135.
Cartwright v. Green, 140.
Caruthers v. Hartsfield, 125.
Case v. Beauregard, 275.
Casey v. Typographical Union, 122.
Cass v. Higenbotam, 108.
Cassell v. Ross, 498.

[The figures refer to pages.]

Cassiday v. McDaniel, 30.
Cassidy v. Shimmin, 20, 40.
Caster v. Wood, 103.
Cathcart v. Robinson, 265.
Cawthorn v. Challe, 373.
Cecil v. Cecil, 135.
Central Manuf'g Co. v. Hartshorne, 67.
Central R. & B. Co. v. Pettus, 34.
Central Trust Co. v. Seasongood, 157.
v. Texas & St. L. Ry. Co., 128.
Chadbourne v. Coe, 20–23, 36, 38.
v. Stockton Sav. & Loan Soc., 262.
Chadwick v. Beach Co., 163.
Chaffee v. Gill, 266.
Chaffin v. Heirs of Kimball, 85.
Chaffraix v. Board of Liquidation, 31.
Chalmers v. Chambers, 224, 227.
Chamberlain v. Agar, 468.
Chambers v. Chalmers, 493, 501.
v. Rowe, 524.
v. Wright, 368, 395.
Champlin v. Champlin, 435, 500.
v. City of New York, 496.
v. Parish, 326, 399.
Chancellor v. Spencer, 310.
Chancey v. May, 34.
Chandler v. O'Neil, 23, 40.
Chapin v. Coleman, 137, 289, 438, 446, 451.
v. Sears, 341.
Chapman v. Beach, 105.
v. Railroad Co., 201, 234.
v. Turner, 433.
Chappell v. Funk, 505.
Chase v. Manhardt, 137.
v. Palmer, 199, 211.
v. Searles, 294, 295, 347.
Chase's Case, 105.
Chauncey v. Tahourden, 402.
Cheatham v. Pearce, 443.
Cheesman v. Shreve, 121.
Cheever v. Perley, 477.
v. Railroad Co., 106.
Cheraw & C. R. Co. v. White, 391.
Cherokee Nation v. Georgia, 391.
v. Southern Kansas Ry. Co., 341.
v. State, 45.
Chess' Appeal, 231.
Chew v. Glenn, 392.
Chicago, R. I. & P. Ry. Co. v. Wisconsin, 263.
Chicago, St. L. & N. O. R. Co. v. Macomb, 215, 221, 222, 360, 365, 369.
Chicago & A. R. Co. v. Union Rolling-Mill Co., 143, 308.
Chicago & G. W. R. Land Co. v. Peck, 20, 33.
Chicot v. Lequesne, 191, 192, 3...
Chicot Co. v. Sherwood, 375.
Chiles, In re, 159.
Chinnock v. Sainsbury, 261.
Chisholm v. McDonald, 48.
Cholmondeley v. Clinton, 463, 477.
Chouteau v. Rice, 293.
Christian v. Crocker, 394.
v. Railroad Co., 22.
Christie v. Bishop, 137.
v. Christie, 347.
Churchill v. Lauer, 51.
Cicotte v. Gagnier, 190.
Cincinnati, U. & F. W. R. Co. v. Wynne, 470.
City Bank of New Orleans v. Walden, 381.
City of Birne v. Bank of England, 45.
City of Los Angeles v. Mellus, 382.
Clair v. Terhune, 158.
Clapp v. Shephard, 288.
Clare v. Wordell, 300, 301.
Clark v. Bell, 198.
v. Brooks, 116.
v. Davis, 370, 373.
v. Jones, 510, 518.
v. Killian, 312.
v. Lord Rivers, 209.
v. People, 159, 160.
v. Periam, 189, 192, 329.
v. Saginaw City Bank, 415.
v. Shelton, 155.
v. Society, 102, 115, 116.
Clarke v. Byne, 280.
v. Mathewson, 299.
v. Turton, 189.
Clark's Ex'rs v. Van Riemsdyk, 134, 136, 137.
Clarkson v. De Peyster, 108, 195.
Clason v. Morris, 83.
Claude v. Handy, 248.
Clayton v. Earl of Winchelsea, 188, 191.
Cleeve v. Gascoigne, 116.
Cleghorn v. Rutherford, 509.
Clements v. Kellogg, 190.
Cleveland Rolling-Mill Co. v. Joliet Enterprise Co., 274.
Clifford v. Coleman, 100.
Cloud v. Calhoun, 135.

[The figures refer to pages.]

Cloud v. Greasley, 399.
Clyburn v. Reynolds, 107, 223.
Coach v. Kent, 525.
Cobb v. Rice, 282.
Coburn v. Odell, 140.
Cocanougher v. Green, 263.
Cochran v. Goodell, 53.
v. McDowell, 360.
Cochrane v. Adams, 368.
v. O'Brien, 280.
Cock v. Ravie, 128.
Cockburn v. Thomas, 394.
v. Thompson, 24, 26, 29, 34, 41, 44, 463.
Cocke v. Trotter, 135, 308.
v. Upshaw, 113.
Cocke's Adm'r v. Gilpin, 147, 148.
Cockrell v. Gurley, 188.
Cockroft, Ex parte, 156.
Code Silver-Min. Co. v. Virginia & Gold Hill Water Co., 123.
Codington v. Mott, 104.
Coffin v. Cooper, 348, 349.
Cohen v. Morris, 122.
Cohens v. Virginia, 55.
Coiron v. Millaudon, 22.
Colthe v. Crane, 147.
Colclough v. Evans, 405.
Cole v. Lake Co., 37.
v. Miller, 311.
v. Shetterly, 502.
Coleman v. Martin, 127.
v. Ross, 135–137.
Cole Silver-Min. Co. v. Virginia & Gold Hill Water Co., 119.
Colgate v. Compagnie Francaise du Telegraphe de Paris, 17.
v. Telegraph Co., 287, 288.
Collins v. Carlile, 240.
v. Knight, 229.
Collinson v. ——, 234.
Colonial & U. S. Mortg. Co. v. Hutchinson Mortg. Co., 17, 18.
Colson v. Smith, 226.
Colt v. Cornwell, 119.
Colton v. Ross, 224, 225, 228, 229, 334, 335.
Coltra v. Green, 240.
Columbus Banking & Ins. Co. v. Humphries, 341.
Colvert v. Millstead's Adm'x, 465.
Commercial Bank v. Reckless, 136, 239, 240.
Commercial Mut. Ins. Co. v. McLoon, 285.
Commercial & Sav. Bank v. Corbett, 223.
Commissioners of Pilotage v. Low, 70.
Com. v. Commissioners of Allegheny, 375.
v. Diffenbach, 162.
v. Pittston Ferry Bridge Co., 360.
Comstock v. Herron, 171, 176, 204, 520.
Conant v. Warren, 385.
Connecticut Mut. Life Ins. Co. v. Smith, 252.
Connelly v. Dickson, 223.
Conner v. Chase, 137.
v. Smith, 341.
Connerton v. Millar, 207.
Connors v. City of Detroit, 230.
Conolly v. Wells, 39, 57.
Conover v. Ruckman, 123.
v. Wright, 465.
Conroy v. Construction Co., 332.
v. Woods, 274–276.
Consequa v. Fanning, 141, 190.
Consolidated Electric Storage Co. v. Atlantic Trust Co., 187, 194.
Constantine v. Twelves, 266.
Contee v. Dawson, 496.
Conwell v. McCowan, 499.
v. Watkins, 462.
Cook v. Beacher, 194.
v. Delebere, 283.
v. Dews, 496.
v. Dorsey, 201, 236.
v. Johnson, 274, 275.
v. Mancius, 418, 463.
v. Martyn, 223.
v. Wheeler, 32, 306.
Cook Co. v. Great Western R. Co., 498.
Cooke v. Davies, 68.
Cooley v. Harris, 500.
Coombs v. Carr, 242.
Cooper v. Stockard, 115.
Cooth v. Jackson, 134.
Copon v. Miles, 472, 473.
Coppin v. Gray, 68.
Corbus v. Teed, 98, 138, 498.
Cordes v. Coates, 259.
Cork v. Wilcock, 466, 476.
Corlies v. Corlies' Ex'rs, 423.
Cornelius v. Halsey, 239, 240.
Cornell v. Andres, 232.

[The figures refer to pages.]

Cornell v. Green, 375.
Cornish v. Keesee, 312.
Cort v. Lassard, 120, 121.
Coster v. Murray, 430.
Cothran v. Scanlan, 230.
Cottington v. Fletcher, 467.
Cottle v. Krementz, 428, 525.
Coulter v. Bower, 239.
Countess of Portland v. Prodgers, 47.
Countz v. Geiger, 136.
Cousins v. Smith, 35.
Cowart v. Perrine, 524.
Cowles v. Buchanan, 188, 214, 215.
v. Carter, 509.
v. Morgan, 331.
Cowslad v. Cely, 43.
Cowtan v. Williams, 280, 281.
Cox v. Dunham, 276.
v. Lynn, 315.
v. Railroad Co., 376.
Coxe v. Smith, 145.
Cozine v. Graham, 90, 261, 329, 399, 493,
Crabb's Adm'r v. Thomas, 197.
Craig v. Chandler, 232.
v. McKinney, 423.
Craige v. Craige, 222.
Crain v. Barnes, 221, 224, 227.
Crane v. Deming, 201, 353.
v. Hutchinson, 225.
v. Insurance Co., 468.
Cranford v. Tyrrell, 121.
Cranston v. Smith, 329.
Crapster v. Griffith, 245.
Crawford v. Fisher, 278.
v. Neal, 111.
Crawshay v. Thornton, 278, 280.
Crease v. Babcock, 34.
Credit Co. v. Arkansas Cent. R. Co., 493.
Cree v. Lord, 243.
Creely v. Brick Co., 118.
Creenwaldt v. May, 119.
Crescent City Live-Stock, Landing & Slaughterhouse Co. v. Butchers' Union Live-Stock, Landing & Slaughterhouse Co., 93, 448, 494.
Cresset v. Mitton, 325.
Cressett v. Mytton, 285.
Crews v. Threadgill, 242.
Criscoe v. Hambrick, 245.
Crocker v. Higgins, 16.
Crocket v. Lee, 190, 320.
Crook v. Glenn, 477.
Crooker v. Randall, 313.
Croone v. Bivens, 274.
Crosier v. Acer, 144.
Crosseing v. Honor, 201, 321.
Crouch v. Hickin, 361, 481.
v. Kerr, 360.
Crow v. Railroad Co., 221.
Crowell v. Botsford, 66, 68, 169.
Cruger v. Halliday, 193, 198, 321, 326.
Culbertson v. Luckey, 135.
Cullen v. Queensberry, 35.
Cullison v. Bossom, 377, 378, 515.
Culver v. Culver, 246.
v. Phelps, 250.
Cumberland Land Co. v. Canter Lumber Co., 305.
Cummings v. Colman, 501.
v. Gill, 306.
v. McCullough, 520.
Cummins v. Cummins, 499.
v. Jerman, 496.
Cunningham v. Campbell, 430.
v. Ferry, 136.
v. Pell, 378.
v. Railroad Co., 222.
Currier v. Howard, 37.
Curry v. Lloyd, 227.
Curtis v. Goodenow, 101, 239.
v. Leavitt, 104.
Curyea v. Berry, 225.
Cushman v. Bonfield, 224, 518.
Cuyler v. Bogert, 507, 510.
v. Moreland, 156.

D

Daggett v. Ayer, 259.
Dainese v. Kendall, 149.
Dakin v. Railway Co., 448.
Dale v. McEevers, 498.
v. Turner, 494.
Dalton v. Thomson, 285.
Daly v. Smith, 120.
Dalzell v. Manufacturing Co., 430.
Danby v. Danby, 108.
Dandridge v. Washington, 28, 34.
Danels v. Taggart's Adm'r, 421.
Danforth v. Roberts, 243.
v. Smith, 221, 222.
Daniel v. Mitchell, 134.
Danison v. Bassford, 495.

[The figures refer to pages.]

Danner v. Brewer, 187.
D'Aranda v. Whittingham, 43.
Darcey v. Lake, 341.
Darling v. Mayor, etc., 119.
v. Roarty, 104.
Darrah v. Boyce, 370.
Dart v. Palmer, 26.
Darwent v. Walton. 41, 43, 56.
Daubigny v. Davallon, 46.
Daughdrill v. Sweeney, 242.
Davenport v. Alston, 194, 320.
v. Auditor General, 498.
Davidson v. Burke, 224.
Davies v. Williams, 373.
Davile v. Peacock, 223.
Davis v. Angel, 196.
v. Christian Union, 307.
v. Clayton, 138.
v. Cripps, 352.
v. Davis, 80, 83.
v. Davison, 495.
v. Earl of Dysart, 196.
v. Hall, 471.
v. Harrison, 262.
v. Mapes, 505, 510.
v. Sawyer, 121.
Davison v. Baker, 71.
Davoue v. Fanning, 341, 470, 471.
Daw v. Eley, 511.
Daws v. Benn, 27.
Dawson v. Amey, 308.
v. Pilling, 442, 455.
v. Sadler, 372.
Day v. Cole, 368.
v. Hunt, 263.
v. Perkins, 240.
v. Schnider, 249.
Dayton v. Dayton, 224.
Deane v. Rastron, 267.
Deans v. Robertson, 230.
Decoux, Succession of, 156.
Deen v. Milne, 263.
Deere v. Guest, 119.
Deglow's Ex'r v. Meyer, 262.
Deimel v. Brown, 135, 137.
De Lacy v. Walcott, 263.
Delafield v. Anderson, 58.
De La Torre v. Bernales, 97.
Delaware & R. Canal Co. v. Camden & A. R. Co., 123.
Delorne v. Hollingsworth, 326.
Demarest v. Wynkoop, 475.
Denison v. Bassford, 83.
Deniston v. Little, 228.
Denlar v. Hile, 263.
Denning v. Smith, 494.
Dennis v. Dennis, 225.
v. Tomlinson, 243.
Denston v. Morris, 397.
Denton v. Denton, 129.
Denys v. Locock, 435, 447.
De Pol v. Sohlke, 120.
De Puy v. Strong, 57.
Desborough v. Curlewis, 450.
v. Harris, 279.
v. Rawlins, 141.
Deshler v. Foster, 76.
Des Moines & M. R. Co. v. Alley, 231.
Desplaces v. Coris, 348.
Detweiler v. Holderbaum, 144.
De Uprey v. De Uprey, 247.
Devaucene v. Devaucene, 162.
Deveraux v. Cooper, 509.
Devonsher v. Newenham, 18, 362, 365, 369.
Dew v. Clarke, 284.
Dewey v. Leonhardt, 239.
Dewing v. Perdicaries, 45.
De Wolf v. Long, 506.
v. Mallett, 236.
v. Manufacturing Co., 50, 342.
v. Pratt, 232, 262.
Dews v. Cornish, 221, 223.
Dexter v. Arnold, 313–316, 465, 477.
Dexter, Horton & Co. v. Long, 240.
Dey v. Telephone Co., 76.
De Zouche v. Garrison, 279–281.
Dial v. Reynolds, 18.
Dias v. Merle, 405.
Dickerson v. Hodges, 495.
Dickson v. Miller, 399.
Didier v. Davison, 417, 418, 466.
Diedrichs v. Railway Co., 124.
Dignan v. Dignan, 131.
Dilburn v. Youngblood, 261.
Dillingham v. Russell, 107.
Dillman v. Dillman, 296.
Dillon v. Barnard, 375, 376.
Dillon's Adm'r v. Bates, 59.
Dimmock v. Bixby, 370, 371.
Dinsmoor v. Hazelton, 509.
Dinsmore v. Westcott, 69.
Dittman v. Repp, 121.
Dix v. Briggs, 53.
Dixon v. Dixon, 360.
v. Higgins, 131.

[The figures refer to pages.]

Dixon v. Wyatt, 299.
Doble v. Potman, 406.
Dobree v. Nicholson, 355.
Dodd v. Astor, 101.
v. Benthal, 221.
v. Seymour, 261.
Dodge v. Dodge, 291.
v. Griswold, 113.
v. Lawson, 279.
v. Perkins, 185, 455.
Doerfler v. Schmidt, 268.
Doggett v. Railroad Co., 29.
Dolder v. Bank, 45.
Donnell v. King's Heirs, 494.
Donnelly v. Ewart, 102.
Donovan v. Dunning, 59.
Dooling v. Moore, 157.
Doremus v. Cameron, 498.
Dorr v. Gibboney, 75.
Dorsch v. Rosenthall, 239.
Dorsey v. Maury, 470.
v. Thompson, 147.
Dorsheimer v. Roorback, 47.
Doswell v. Buchanan's Ex'rs, 494.
Douglass v. Sherman, 299, 300.
Dowell v. Applegate, 378.
Downie v. Nettleton, 514.
Dows v. McMichael, 425, 429.
Doyle v. Teas, 231, 262.
Doyley v. Smith, 472.
Drake v. Wild, 397.
Drew v. Beard, 190.
v. Drew, 457, 459.
Driver v. Fortner, 221, 223.
Droste v. Hall, 362.
Drum v. Painter, 266.
Drury v. Conner, 136.
Dryden v. Robinson, 474.
Duchesse d'Auxy v. Porter, 391.
Duckworth v. Duckworth's Adm'r, 188.
Dudley v. Bachelder, 329.
v. Hurst, 124.
Dugan v. Gittings, 137.
Duke of Beaufort v. Neeld, 258.
Duke of Bolton v. Williams, 278.
Duke of Brunswick v. King of Hanover, 325.
Duke of Dorset v. Girdler, 285.
Dummer v. Corporation of Chippenham, 400.
Dumond v. Church, 18.
v. Magee, 495.
Dumont v. Fry, 202.
Duncalf v. Blake, 209.
Dunch v. Kent, 28.
Dungey v. Angove, 280.
Dunham v. Gates, 136, 521.
v. Jackson, 128, 230.
v. Railroad Co., 191, 320.
v. Ramsey, 26, 56.
v. Village of Hyde Park, 375.
Dunlap v. Gibbs, 331.
Dunn v. Clarke, 73.
v. Dunn, 72.
Dunn's Ex'rs v. Renick, 315.
Durand v. Gray, 274.
Durant v. Redman, 373.
Durfee v. McClurg, 138, 498.
Durham v. Taylor, 135.
Durling v. Hammar, 342, 372, 377, 393.
Dursley v. Berkeley, 197.
v. Fitzhardinge, 29, 284, 285.
Dutilh v. Coursault, 136, 137.
Dwight v. Humphreys, 429.
v. Railroad Co., 445, 461.
v. Webster, 239.
Dwinal v. Smith, 512, 513.
Dyer v. Vinton, 248.
Dyett v. Coal Co., 137.

E

Eagle v. Beard, 394.
Eagle Fire Ins. Co., v. Lent, 18.
Earle v. Pickin, 189.
Earl of Egremont v. Hamilton, 483.
Earl of Glengall v. Frazer, 511.
Earl of Granard v. Dunkin, 121.
Earl of Litchfield v. Bond, 402.
Earl of Ripon v. Hobart, 124.
East India Co. v. Boddam, 231.
v. Campbell, 140.
v. Edwards, 278, 280.
v. Henchman, 325, 361.
Eastman v. Bank, 339.
v. Batchelder, 302.
v. McAlpin, 134.
East & West R. Co. of Alabama v. East Tennessee, V. & G. R. Co., 124.
Eaton's Appeal, 519, 520, 522.
Eberhart v. Gilchrist, 198.
Eberly v. Groff, 213.
Edgar v. Clevenger, 294.

[The figures refer to pages.]

Edison Electric Light Co. v. Equitable Life Assur. Soc. of U. S., 467.
Edmeston v. Lyde, 52.
Edmondson v. Moseby's Heirs, 311.
Edney v. King, 193.
Edsell v. Buchanan, 327, 374.
Edwards v. Drake, 360.
v. Edwards, 325, 334.
v. Hulbert, 370.
v. Sartor, 339.
Egmont v. Smith, 16.
Elder v. Jones, 48.
Elderkin v. Shultz, 31.
Eldridge v. Pierce, 494.
Electrolibration Co. v. Jackson, 424.
Elgin Wind-Power & Pump Co. v. Nichols, 425.
Ellice v. Goodson, 361.
Ellicott v. Insurance Co., 106.
v. Warford, 106.
Elliott v. Insurance Co., 190.
Ellison v. Fox, 259.
Ellsworth v. Curtis, 355–357.
Elizey v. Lane, 311.
Elmendorf v. Delancey, 201, 235, 236.
v. Taylor, 19, 21, 39, 41, 477.
El Modelo Cigar Manuf'g Co. v. Gato, 371.
Elmslie v. McAulay, 202.
Elwell v. Fosdick, 33.
Elwood v. Bank, 107.
Emack v. Kane, 122.
Emans v. Emans, 311, 377.
Embury v. Bergamini, 85.
Emerson v. Dallison, 352.
v. Walker Tp., 194, 201.
Emery v. Bidwell, 385.
v. Downing, 85.
v. Erskine, 53.
v. Pickering, 96.
Emmott v. Mitchell, 414, 417.
Emory v. Grenough, 186.
Enfield Toll-Bridge Co. v. Hartford & N. H. R. Co., 224.
English v. Foxall, 224.
Ensworth v. Lambert, 294.
Equitable Life Assur. Soc. of the United States v. Patterson, 373.
Ercanbrack v. Rich, 240.
Erickson v. Nesmith, 72.
Erskine v. Garthshore, 503.
Essex Paper Co. v. Greacen, 369.
Essley v. Sloan, 242.
Estep v. Watkins, 498.
Estes v. Worthington, 461.
Etter v. Dignowitty, 354.
Eudo v. Caleham, 473.
Eureka Co. v. Edwards, 231.
Eustace v. Gaskins, 113.
Evan v. Avon, 326.
Evans v. Bolling, 101.
v. Davis, 233.
v. Evans, 236.
v. Harris, 435, 438, 474.
v. Railroad Co., 188.
v. Sanders, 157.
v. Stokes, 54.
Evansville & R. R. Co. v. Maddux, 332.
Eveland v. Stephenson, 311.
Everett v. Prythergch, 349.
Eversole v. Maull, 498.
Everson v. Assurance Co., 385.
Everts v. Agnes, 98, 525.
Ewing v. Patterson, 305, 308.
Exchange Bank v. Morrall, 231.
Exeter College v. Rowland, 343.
Eyre v. Potter, 190.

F

Fackler v. Worth, 162.
Fairbank v. Cudworth, 121.
Fairburn v. Pearson, 105.
Fairly v. Priest, 342.
Faithful v. Hunt, 28.
Fall v. Hafter, 362.
Fallowes v. Williamson, 57, 298, 406, 483.
Fanning v. Dunham, 233.
Farley v. Blood, 282.
v. Kittson, 411–413.
Farmers' Loan & Trust Co., Petitioner, 149, 156.
Farmers' Loan & Trust Co. of New York v. Chicago & A. Ry. Co., 162.
Farmers' & Mechanics' Bank v. Bronson, 306.
v. Polk, 43.
Farmington Village Corp. v. Sandy River Nat. Bank, 256.
Farnam v. Brooks, 188, 205.
Farnham v. Clements, 329.
Farrell v. McKee, 498.
Faulder v. Stuart, 214–216, 509.

[The figures refer to pages.]

Faulk v. Faulk, 114.
Fawkes v. Pratt, 234.
Fearey v. Hayes, 104.
Fell v. Brown, 42.
v. College, 77.
Fellows v. Fellows, 58, 345.
v. Hall, 85.
Felt v. Turnure, 381.
Fencott v. Clarke, 126.
Fenhoulet v. Passavant, 348.
Fenn v. Craig, 44.
Fenton v. Hughes, 17, 18.
v. Steere, 245.
Ferguson v. Hass, 236.
v. O'Harra, 94.
Ferrand v. Hamer, 427.
Ferry v. Laible, 342.
Fidelity Insurance & Safe-Deposit Co. v. Shenandoah Iron Co., 111.
Field v. Hastings & Bradley Co., 506, 507.
v. Holland, 137, 138.
v. Jones, 107.
v. Maghee, 48.
v. Schieffelin, 307, 308, 406.
v. Wilbur, 135.
Fiery v. Emmert, 339, 344, 345.
Fifth Ave. Bank of Brooklyn v. Cudlipp, 22.
Fifth Nat. Bank v. Long, 55.
Filer v. Levy, 422.
Finch v. Martin, 353, 354.
Finden v. Stephens, 196.
Findlay v. Hinde, 289.
v. Smith, 498.
Fink v. Patterson, 34.
Finley v. Lynn, 223.
First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 106, 107.
First Nat. Ins. Co. v. Salisbury, 127.
First Presbyterian Church v. Logan, 257.
Fischer v. Hayes, 111.
Fish v. Howland, 30.
v. Miller, 424, 472, 473.
Fisher v. Moog, 223, 334.
v. Owen, 348.
v. Rutherford, 100.
v. Stiefel, 22.
Fisler v. Porch, 135.
Fitch v. Smith, 169.
v. Stamps, 137.
Fitzgerald v. Cummings, 368.
Fitzhugh v. Smith, 232, 499.
Fitzpatrick v. Beatty, 190.
Flagg v. Bonnel, 424.
v. Mann, 134, 475.
Flagler v. Crow, 312.
Flanders v. Chamberlain, 224.
Fleece v. Russell, 306.
Fletcher v. Holmes, 309.
v. Lee, 70.
v. Willard, 267.
Flewellen v. Crane, 190.
Flint v. Field, 208, 209.
Florence Sewing-Mach. Co. v. Zeigler, 227.
Floyd v. Ritter's Adm'r, 299.
Fogg v. Blair, 375.
v. Price, 397.
Foley v. Hill, 446.
Folger v. Insurance Co., 106.
Follansbee v. Mortgage Co., 499.
Forbes v. Railroad Co., 127.
v. Skelton, 449.
v. Tuckerman, 47, 148, 377, 379.
Force v. Dutcher, 493.
Ford v. Earl of Chesterfield, 353.
v. Joyce, 257.
v. Peering, 92, 326, 361.
Fordham v. Rolfe, 24.
Fordyce v. Shriver, 138, 498.
Forgay v. Conrad, 147.
Forniquet v. Forstall, 58.
Forquer v. Forquer, 151.
Forrest v. Frazier, 136.
Forsyth v. Clark, 190, 261.
Fosdick v. Van Husan, 232.
Foss v. Haynes, 512.
Foster v. Burem, 299.
v. Deacon, 295.
v. Hall, 141.
v. Hill, 253, 331.
Fougeres v. Murbarger, 341.
Fowler v. Black, 259.
v. Lee, 281.
Fowlkes v. Webber, 70.
Fox v. Dyer, 268, 269.
v. Ford, 113.
v. Pierce, 187.
Foxworth v. White, 499.
Frame v. Frame, 263.
Franco v. Franco, 31.
Franklin v. Greene, 114, 222, 224.
v. Jones, 258.

[The figures refer to pages.]

Franklin v. Osgood, 227.
Franklin Sav. Bank v. Taylor, 250.
Fraser v. Passage, 266.
Freehold Mut. Loan Ass'n v. Brown, 495.
Freel v. Railway Co., 141.
Freeman v. Bank, 101, 268.
v. Clay, 313.
v. Reagan, 366.
Freichnecht v. Meyer, 187, 206, 207.
French v. Bank, 17.
v. Gapen, 127.
v. Shotwell, 415.
Frisk v. Reigelman, 266.
Frye v. Bank, 18, 48.
Fryer v. Rockefeller, 240.
Fuller v. Benjamin, 56.
v. Knapp, 214, 215.
Fulton v. Golden, 401.
v. Greacen, 296, 427.
v. Harman, 121.
v. Rosevelt, 48.
Fulton Bank v. New York & S. Canal Co., 493, 496.
Fulton Co. Sup'rs v. Mississippi & W. R. Co., 495, 496.
Furlong v. Riley, 397.

G

Gage v. Abbott, 187, 252.
v. Griffin, 252.
v. Kaufman, 211, 250, 253.
v. McLaughlin, 249.
v. Parker, 252, 294.
v. Pumpelly, 230.
v. Reid, 245.
v. Schmidt, 251, 252.
Gainer v. Russ, 501.
Gaines v. Agnelly, 493, 515, 516.
v. Chew, 58, 59, 341, 347.
v. Mausseaux, 416.
Galatian v. Erwin, 308.
Galloway v. Hamilton's Heirs, 494.
Galton v. Hancock, 14.
Galveston R. R. v. Cowdrey, 34.
Gambee v. Atlee, 48.
Gamble v. Johnson, 114.
v. Loop, 251.
Gamewell Fire-Alarm Tel. Co. v. Mayor, etc., 496.
Gardiner v. Hardey, 135.
Gardner v. Cole, 265.
v. Trustees of Village of Newburgh, 121.
Garlick v. Garlick, 378.
v. Strong, 372, 373.
Garner v. Prewitt, 147.
v. Thorn, 394.
Garrard v. Webb, 149.
Garrett v. Railroad Co., 346.
v. Terminal Co., 411.
v. White, 245.
Gaskell v. Gaskell, 30.
Gates v. Boomer, 53.
v. Steele, 119.
Gault v. Hoagland, 84.
Geary v. Sheridan, 82.
Gell v. Hayward, 285, 325.
Gelpeke v. Railroad Co., 162.
Gelston v. Hoyt, 45, 288.
George v. Railroad, 370.
German American Seminary v. Kiefer, 51.
German Evangelical Lutheran Church v. Maschop, 124.
Gernon v. Boccaline, 425.
Gerrish v. Pratt, 382.
Giant-Powder Co. v. Safety Nitro-Powder Co., 416.
Gibbon v. Dougherty, 296.
Gibbons v. Bridge Co., 17.
Gibson, Ex parte, 71.
v. Furniture Co., 267.
v. Goldthwaite, 278, 281, 282.
v. Green's Adm'r, 493.
v. Jayne, 371.
v. McCormick, 135, 221, 222, 228.
v. Rees, 141.
v. Whitehead, 418.
Gier v. Gregg, 103.
Giffard v. Hort, 29, 317.
Giles v. Eaton, 500.
Gilham v. Cairns, 20, 26.
Gilkey v. Paige, 505, 506, 511.
Gillespie v. Cummings, 342.
Gillett v. Hickling, 21.
Gilman v. Rives, 382.
Girdner v. Girdner, 253.
Giveans v. McMurtry, 233.
Glaser v. Priest, 278.
Glasscott v. Copper-Miners' Co., 371.
Glassington v. Thwaites, 354, 356, 357.
Gleason v. Wilson, 269.
Gleaves v. Morrow, 348.

[The figures refer to pages.]

Glegg v. Legh, 484.
Gleghorne v. Gleghorne, 520.
Glengall v. Edwards, 511.
Glenn v. Clark, 305.
v. Hebb, 97, 98, 499.
Glidden v. Norvell, 200, 368, 370.
Glos v. Randolph, 518.
Glyn v. Soares, 17, 482.
Godfrey v. Black, 120.
v. Chadwell, 472.
v. Terry, 368, 388, 389.
Goebel v. Supply Co., 236.
Goff v. Kelly, 306.
Goldsmith v. Osborne, 242.
Goldthwait v. Day, 232.
Goltra v. Green, 240.
Gooch v. Green, 363, 370.
Good v. Blewitt, 25, 26, 28.
Goodenow v. Curtis, 102, 196, 262.
Goodess v. Williams, 30.
Goodman v. Nester, 252.
Goodrich v. Parker, 349, 351.
v. Pendleton, 416, 432, 438, 446, 466.
Goodwin v. Bishop, 468.
v. Goodwin, 59.
v. McGehee, 102, 104.
Goodyear v. Bourn, 101, 104.
v. Chaffee, 77.
v. Rubber Co., 114.
v. Toby, 423.
Gordon v. Green, 31.
v. Harvester Works, 342.
v. Reynolds, 362.
Gordon's Adm'r v. Ross, 341.
Gordon's Adm'x v. Hammell, 508.
Gore v. Dickinson, 245.
Gormally & Jeffery Manuf'g Co. v. Bretz, 214.
Gormley v. Clark, 224.
Gould v. Gould, 50, 477.
v. Railroad Co., 375, 382, 383
v. Sternburg, 252.
v. Williamson, 135.
Grabenheimer v. Blum, 294.
Grace v. Terrington, 30.
Grady v. Robinson, 509, 510.
Graham v. Berryman, 224.
v. Coape, 354–357.
v. Elmore, 367.
Gram v. Stebbins, 512.
Grames v. Hawley, 311.
Grandin v. Leroy, 493.
Grand Junction Canal Co. v. Dimes, 159.
Grant v. Insurance Co., 149, 448.
Graves v. Ewart, 250, 251.
v. Hull, 371.
Gray v. Davis, 262.
v. Faris, 134.
v. Gray, 381.
v. Larrimore, 14.
v. Regan, 362.
Greeley v. De Cottes, 257, 259.
Green v. Bostwick, 107.
v. Casey, 499.
v. Covilliaud, 190.
v. Fisk, 147.
Greene v. Harris, 474.
Greenough v. Gaskell, 141, 403, 513.
Greenup v. Porter, 20.
Greenwaldt v. May, 119.
Greenwood v. Churchill, 338, 347.
Greer v. Turner, 315.
Gregor v. Molesworth, 311, 312.
Gregory v. Molesworth, 208, 209.
v. Pike, 305.
v. Stetson, 14, 22, 39.
v. Swift, 39.
Greig v. Russell, 374, 375.
Greither v. Alexander, 59.
Gresham v. Peterson 128.
Gridley v. Wynant, 33, 41.
Griel v. Randolph, 246.
Griffin v. Archer, 16.
v. Bank, 496.
Griffith v. Ricketts, 184.
Griggs v. Staplee, 228.
Grignon's Lessees v. Astor, 72.
Grigsby v. Breckinridge, 121.
v. Weaver, 116.
Grim v. Wheeler, 214, 508.
Grimes v. French, 227.
Grimstone v. Carter, 509.
Grosholz v. Newman, 320.
Grotenkemper v. Carver, 382.
Grover v. Fox, 232.
Grubbs v. Colter, 185.
Grymes v. Sanders, 258.
Guadalup Co. v. Johnston, 262.
Guerand v. Dandelet, 120.
Guion v. Insurance Co., 156.
Gullett v. O'Connor, 354.
Gun v. Prior, 453.
Gunn v. Brentley, 136.
Guyton v. Flack, 106.
Gwynne v. Heston, 266.

[The figures refer to pages.]

H

Haaren v. Lyons, 239.
Hackley v. Mack, 306, 308, 500.
Haddock v. Thomlinson, 43, 234.
Hadley v. Morrison, 269.
Hagan v. Ryan, 239.
v. Walker, 18, 21.
Hagar v. Buck, 31.
Hagenbeck v. Arena Co., 106.
Haggerty v. Duane, 108.
v. Land Co., 264.
Hagthorp v. Hook's Adm'rs, 442, 507, 510, 520.
Haight v. Morris Aqueduct, 496.
Haines v. Taylor, 124.
Halderman v. Halderman, 430.
Hale v. Chandler, 188.
v. Insurance Co., 76.
v. Railroad Co., 342.
Hall v. Dodge, 470.
v. Fisher, 379.
v. Lamb, 155.
v. Maltby, 189.
v. Pierce, 224, 226.
v. Railway Co., 263.
v. Warren, 260, 261.
v. Wood, 510, 511.
Hallett v. Hallett, 19, 34, 41, 42.
Halstead v. Bank, 475.
v. Meeker, 223, 228.
Hamblin v. Bishop, 266.
Hambrick v. Dickey, 321.
Hamersley v. Lambert, 46, 56.
Hamet v. Dundass, 266.
Hamilton v. Houghton, 407.
v. Marks, 282.
v. Whitridge, 121.
Hamlin v. Wright, 58.
Hammond v. Bank, 338.
v. Messenger, 31.
v. Place, 101, 104, 292.
v. Tarver, 22.
Hancett v. Goetz, 266.
Hancock v. Carlton, 431, 434.
Hand v. Dexter, 394.
Handley v. Heflin, 342.
Handy v. Harding, 41.
Hanna v. Ratekin, 499.
Hanner v. Silver, 247.
Hanscom v. Hinman, 233, 326.
Hansford v. Holdam, 241.
Hardin v. Boyd, 104, 334.
Harding v. Handy, 24, 169, 189.
v. Harding, 495.
v. Hardrett, 475.
v. Hawkins, 520.
v. Pingey, 242.
Hardingham v. Nicholls, 476.
Hardman v. Ellames, 403, 433, 434, 476.
Hardwick v. Bassett, 517, 518, 524.
Hardy v. Heard, 518.
Hargraves v. Lewis, 311, 312.
Harlem Co-operation Building & Loan Ass'n v. Freeburn, 23.
Harlow v. Mister, 30.
Harman v. City of Lynchburg, 157.
v. Kelley, 246.
Harms v. Jacobs, 228.
Harpending v. Dutch Church, 398, 466.
Harrington v. Brewer, 502.
Harris v. Bannon, 120.
v. Cornell, 374.
v. Deitrich, 84.
v. Fly, 494.
v. Hess, 108.
v. Ingledew, 24, 28.
v. Pollard, 405.
Harrison v. Farrington, 436, 446, 447, 473.
v. Hallum, 276.
v. Harrison, 500.
v. Hogg, 343, 366.
v. Nixon, 185, 187.
v. Rowan, 31, 100.
Harshman v. Mitchell, 263.
Hart v. Carpenter, 135.
v. Goldsmith, 242.
v. Granger, 264.
v. McClellan, 262.
v. McKeen, 229.
v. Sanderson's Adm'rs, 441.
v. Stribling, 320.
Hartley v. Matthews, 231.
Harvey v. Morris, 322.
Harward v. Drainage Co., 52.
v. Illinois, 52.
Harwood v. Railroad Co., 317, 321.
Haskell v. Haskell, 403, 514.
v. Queen, 245.
Haskins v. Burr, 289.
Hassam v. Day, 245.
Hastings v. Belden, 372.
Hatch v. Bancroft-Thompson Co., 423, 442.

[The figures refer to pages.]

Hatch v. Eustaphieve, 495.
v. Railroad Co., 111.
v. Village of St. Joseph, 252, 370.
Hauser v. Roth, 114.
Haven v. Brown, 272.
Hawes v. Oakland, 122.
Hawkins v. Clermont, 370.
v. Crook, 80.
Hawley v. Clowes, 121.
v. Wolverton, 349.
Haworth v. Taylor, 221.
Haws v. Tierman, 469.
Hay v. Estell, 245.
Hayden v. Bucklin, 169.
Hayes v. Dayton, 362, 393, 415, 493.
v. Hayes, 31.
v. Johnson, 278.
Hayes' Appeal, 245.
Hayney v. Coyne, 140.
Hays v. Heatherly, 377, 378, 380.
v. Humphreys, 38.
v. Lewis, 240.
v. Montgomery, 269.
Hayward v. Andrews, 31.
v. Bank, 228.
v. Constable, 470.
Hazard v. Durant, 34, 40, 41.
Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co., 292.
Head v. Egerton, 476.
Headley v. Bell, 119.
Heartt v. Corning, 410, 431, 442, 510.
Heath v. Percival, 44.
v. Railroad Co., 40, 497.
Heermans v. Montague, 311.
Heffron v. Knickerbocker, 293.
Helms v. Green, 266.
Henderson, Ex parte, 56.
v. Chaires, 436.
v. Henderson, 470.
v. Moss, 109.
v. Peck, 221.
v. Sherman, 54.
Hendrickson v. Hinckley, 119.
Hendrix's Heirs v. Clay, 312.
Henkle v. Assurance Co., 257.
Hennessy v. Carmony, 121.
Henriques v. Dutch Co., 45.
Henry v. Blackburn, 360.
v. Gregory, 495.
v. Henry, 348.
v. Insurance Co., 292.
v. Suttle, 190.
Henshaw v. Wells, 223.
Hepburn v. Durand, 505, 508.
Herdsman v. Lewis, 114.
Herring v. Clobery, 141.
Herrington v. Hubbard, 20.
Hersey v. Veazie, 34.
Hershberger v. Blewett, 251.
Hertell v. Van Buren, 88, 461.
Heyn v. Heyn, 82.
Hichens v. Congreve, 34.
Hickey v. Railroad Co., 52, 343.
v. Stone, 365, 374.
Hickling v. Wilson, 52.
Hickman v. Stout, 465.
Hickox v. Elliott, 32.
Hickson v. Lombard, 190.
Hiern v. Mill, 227, 228.
Higdon v. Higdon, 142.
Higgins v. Curtiss, 101.
High v. Batte, 494.
Highstone v. Franks, 199, 498.
Hildebrand v. Beasley, 307.
Hill v. Beach, 226, 228.
v. Lackey, 501.
Hilleary v. Hurdle, 228.
Hillens v. Brinsfield, 245.
Hilliard v. Brevoort, 100.
Hill's Adm'r v. Hill, 342.
Hilton v. Barrow, 406.
v. Earl of Granville, 124.
v. Guyott, 441, 442, 472, 476.
Hinckley v. Pfister, 231.
Hine v. Dodd, 134.
Hinkle v. Davenport, 50.
v. Margerum, 122.
Hitner v. Suckley, 73.
Hoadley v. Smith, 362, 370.
Hoare v. Harris, 16, 20.
Hobart v. Andrews, 187.
v. Ballard, 106.
Hoboken Bank for Savings v. Beckman, 137.
Hobson v. McArthur, 221, 222.
Hodge v. Geise, 124.
Hodges v. Millikin, 314.
Hodgkin v. Longden, 400, 451.
Hodgson v. Butterfield, 97.
Hodson v. Ball, 316.
Hoffman v. Knox, 149.
v. Ross, 370.
Hogan v. Alston, 159.
Hogencamp v. Ackerman, 511.
Hogg v. Kirby, 270.

[The figures refer to pages.]

Hoggart v. Cutts, 278, 279, 347.
Holtt v. Burleigh, 114.
Holabird v. Burr, 520.
Holbrook v. Winsor, 250.
Holden v. Holden, 224, 225, 227, 250, 252.
Holladay's Case, 510.
Holland v. Baker, 31.
v. Prior, 14.
Hollenback, Appeal of, 257, 258.
v. Donnell, 106.
Hollingshead's Case, 483.
Holman v. Bank, 342.
Holmes v. Remsen, 470.
v. State, 518.
Holt v. Bancroft, 274–276.
v. Daniels, 363.
Holton v. Guinn, 493, 495, 496, 502.
Homan v. Shiel, 463.
Home Insurance & Banking Co. of Texas v. Myer, 505.
Hony v. Hony, 440.
Hood v. Inman, 348, 351, 501, 504.
v. Pimm, 131.
Hooe v. Marquess, 113.
Hook v. Dorman, 373.
v. Richeson, 23, 499.
Hoopes v. Bailey, 242.
Hop Bitters Manuf'g Co. v. Warner, 151.
Hopkins v. Lead Co., 20.
v. Medley, 506.
v. Snedaker, 225.
Hopper v. Hopper, 498, 502.
Horner v. Harris' Ex'r, 115.
Hornor v. Hanks, 306.
Horsford v. Gudger, 375, 397.
Horsley v. Fawcett, 32.
Horton v. Baptist Church, 279.
v. Sledge, 245, 347.
Hosack v. Rogers, 108.
Hosford v. Gudger, 397.
v. Merwin, 245.
Hoskins v. Cole, 434.
Hosmer v. Jewett, 367.
Hotchkiss v. Nichols, 470.
Hough v. Richardson, 134.
Houghton v. Reynolds, 209, 334.
House v. Mullen, 144.
Houseal v. Gibbes, 112.
Hovenden v. Annesley, 466.
v. Lord Annesley, 477.
How v. Best, 16.
v. Tenants of Bromsgrove, 255.
Howard v. Howard, 113.
v. Railway Co., 40, 162.
Howe v. Duppa, 414, 421, 477.
v. Harvey, 184, 186.
v. Robins, 235, 236.
v. Russell, 101, 104.
v. Willard, 77, 123.
Howell v. Ashmore, 513.
v. Foster, 14, 20.
Howe Machine Co. v. Gifford, 279.
Howth v. Owens, 57, 144.
Hoxsey v. Railway Co., 367, 370, 371.
Hoyle v. Moore, 234, 235, 237.
Hoyt v. Godfrey, 266, 267.
v. Hoyt, 190, 457.
Hubbard v. McNaughton, 191.
v. Mortgage Co., 221, 398.
Hubbell v. Warren, 35.
Huber v. Diebold, 307.
Hudson v. Barrett, 232.
v. Maddison, 343.
Huffman v. Hummer, 102.
Huggins v. Building Co., 415, 469.
Hughes v. Biddulph, 141.
v. Blake, 98, 426, 525.
v. Edwards, 477.
v. U. S., 469.
Hullet v. King of Spain, 45.
Hummel v. Moore, 502.
Humphreys v. Butler, 465.
v. Humphreys, 43.
v. Ingledon, 195.
v. Tate, 194, 201, 203, 326.
Hungerford v. Cushing, 107.
Hunkins v. Hunkins, 263.
Hunt v. Johnson, 438.
v. Rousmaniere, 429.
v. Thorn, 135.
v. Weiner, 33.
Hunter v. Justices of Campbell Co., 372.
Hurd v. Case, 307, 499.
v. Molles, 461.
Hurlbut v. Britain, 424.
Hurt v. Blount, 240.
v. Freeman, 239.
Huston v. McClarty, 234.
Hutchinson v. Bank, 268.
Hutchison v. Sinclair, 518.
Huyck v. Bailey, 498, 522.

[The figures refer to pages.]

Hyde v. Redding, 398.
v. Warren, 281.
Hyland v. Hyland, 258.
Hyre v. Lambert, 232.
Hyslop v. Hoppock, 71.

I

Iglehart v. Miller, 379.
Iler v. Routh's Heirs, 311.
Ilett v. Collins, 398.
Imperial Gaslight & Coke Co. v. Broadbent, 124.
Indiana S. R. Co. v. Liverpool, London & Globe Ins. Co., 307.
Ingersoll v. Stiger, 520.
Ingle v. Jones, 131.
Ingraham, In re, 273.
Inhabitants of Deerfield v. Nims, 54.
Inhabitants of Montville v. Haughton, 45.
Inhabitants of Warren v. Inhabitants of Hope, 313.
Innes v. Evans, 224.
Insurance Co. v. Bailey, 9.
Insurance Co. of North America v. Svedsen, 50.
Investor Pub. Co. of Massachusetts v. Dobinson, 188.
Irnham v. Child, 189.
Irvine v. McRee, 162.
Irving v. De Kay, 307.
Irwin v. Everson, 105.
Isaacs v. Cooper, 272.
v. Steel, 224.
Isham v. Miller, 354, 355.
Isler v. Grove, 113.
Ison v. Ison, 135.
Ivy v. Kekewick, 514.

J

Jackens v. Nicholson, 261.
Jackson v. Ashton, 184–186, 189, 190, 311, 320.
v. Bowling, 73.
v. Edwards, 84.
v. Grant, 307.
v. Jackson, 313.
v. McChesney, 475.
Jacob v. Hall, 230.
Jacomb v. Knight, 119.
James v. Bird's Adm'r, 221, 222.
v. Kennedy, 227.
v. McKernon, 214, 320.
v. Sadgrove, 465, 466.
Jameson v. Conway, 524.
v. Jameson's Adm'x, 148, 149.
James T. Hair Co. v. Daily, 506.
Janeway v. Green, 105.
Jaques v. Episcopal Church, 147.
v. Trustees, 155.
Jarvis v. Palmer, 365, 414.
Jaynes v. Goepper, 342.
Jenkins v. Bacon, 252.
v. Bank, 294.
v. Bennett, 126.
v. Eldredge, 293, 312, 471.
v. Greenbaum, 501.
v. Prewitt, 314.
v. Van Schaak, 245, 248.
Jenks v. Hathaway, 253.
Jenness v. Smith, 23.
Jenney v. Laurens, 70.
Jennings v. Jenkins, 24.
Jenny v. Crase, 124.
Jerome v. Jerome, 201, 285, 327.
v. McCarter, 18.
Jerrard v. Saunders, 89, 404, 433.
Jessup v. Railroad Co., 14.
Jesup v. Railroad Co., 308.
Jesus College v. Gibbs, 502.
Jew v. Wood, 278, 280.
Jewell v. Gilbert, 71.
Jewett v. Garrett, 71.
v. Tucker, 44.
J. K. Orr Shoe Co. v. Kimbrough, 234.
Jodrell v. Slaney, 509, 511.
Johnson v. Atkinson, 280.
v. Brooks, 260, 261.
v. Clendenin, 128.
v. Crippen, 134.
v. Everett, 147, 149.
v. Golder, 242.
v. Helmstaedter, 210.
v. Huling, 252.
v. Johnson, 505.
v. McChesney, 252.
v. Machine Co., 332.
v. Mantz, 223.
v. Murray, 495.
v. Peck, 299.
v. Pinney, 159.
v. Railroad Co., 261.

[The figures refer to pages.]

Johnson v. Rankin, 30.
v. Roberts, 375.
v. Schumacher, 354.
v. Snyder, 294.
v. Toulmin, 494.
v. Tucker, 349.
Johnston v. Hainesworth, 114
Jones v. Andrews, 75.
v. Belt, 520.
v. Browse, 107.
v. Bush, 222.
v. Christian, 114.
v. Davenport, 104.
v. Farrell, 279.
v. Felch, 49.
v. Foster, 341, 342, 344.
v. Frost, 43, 366, 370.
v. Jones, 137, 292, 300, 325.
v. Kenny, 70.
v. Magill, 123.
v. Mason, 70, 498.
v. Meredith, 450.
v. Neely, 524.
v. Newhall, 261.
v. Oil Co., 254.
v. Pugh, 513.
v. Roberts, 165, 166.
v. Sampson, 129.
v. Seugueira, 462.
v. Slauson, 398.
v. Smith, 267, 307, 499.
v. Thomas, 476.
v. Van Doren, 224.
v. Wilson, 149.
v. Wing, 501.
Jordan v. Buschmeyer, 269.
v. Clark, 190, 224, 225, 229.
v. Jordan, 101.
v. Miller, 105, 106.
Jourolmon v. Massengill, 380, 494.
Joy v. Wirtz, 14, 42.
Joyce v. De Moleyns, 475.
Judd v. Seaver, 137, 233.
Judson, In re, 159.
v. Corcoran, 475.
Junkins v. Lovelace, 341.
Juzan v. Toulmin, 344.

K

Kanawha Lodge No. 25 v. Swann, 307.
Kanawha Valley Bank v. Wilson, 201.
Kane v. Bloodgood, 466.
Kane Co. v. Herrington, 355.
Kankakee & S. R. Co. v. Horan, 376.
Kansas Pac. Ry. Co. v. McBratney, 353.
Karkins v. Biddle, 104.
Katz v. Brewington, 106.
Kavanagh v. Railroad Co., 256.
Kay v. Marshall, 417, 418.
Kearney, Ex parte, 159, 160.
Keen v. Jordan, 185, 236, 367.
Keen's Appeal, 289.
Keighler v. Ward, 161.
Keil v. West, 84, 85.
Keirle v. Shriver, 155.
Keller v. Ashford, 157.
v. Stolzenbach, 469, 471.
v. Whitledge, 268.
Kelley v. Ryder, 506.
Kellner v. Insurance Co., 423, 424.
Kelly v. Eckford, 127.
v. Payne, 221–223.
Kelly's Heirs v. McGuire, 191.
Kelsey v. Western, 190.
Kemp v. Mackrell, 116.
v. Mitchell, 242.
v. Pryor, 388.
v. Squire, 85.
Kendallville Refrigerator Co. v. Davis, 288.
Kendrick v. Spotts, 157.
Kennedy v. Creswell, 424, 425, 428.
v. Daly, 317.
v. Kennedy, 114, 354.
v. State Bank, 103.
Kenon's Ex'rs v. Williamson, 312.
Kent v. Snyder, 258.
Kentucky Silver Min. Co. v. Day, 75, 184.
Kerr v. Watts, 16.
Kerrison v. Stewart, 33.
Kershaw v. Thompson, 162.
Ketcham v. Coal Co., 280, 281.
Ketchum v. Driggs, 429.
Kettle v. Crary, 34.
Kibbe v. Benson, 71.
Kibby v. Kibby, 512.
Kidd v. Horry, 122.
v. Manley, 327.
Kilgannon v. Jenkinson, 252.
Killian v. Ebbinghaus, 9, 114, 278, 280, 281.
Kilpatrick v. Strozier, 381.

[The figures refer to pages.]

Kimball v. Ward, 495.
Kimberly v. Arms, 110, 111.
v. Sells, 404, 514.
Kimbro v. Railway Co., 383.
Kinder v. Macy, 276.
King v. Exchange Co., 85.
v. Gildersleeve, 262.
v. Harrington, 240.
v. Heming, 451.
v. King, 106.
v. Ray, 501, 510.
King of Spain v. Machado, 45, 394.
v. Oliver, 45.
King of the Two Sicilies v. Willcox, 402.
Kinnaman v. Henry, 510.
Kinney v. Mining Co., 331.
v. Stewart, 70.
Kinsey v. Howard, 341.
v. Kinsey, 470, 471.
Kip v. Kip, 199.
Kipp v. Hanna, 106.
Kirby v. Taylor, 432.
Kirkham v. Justice, 184.
Kirkley v. Burton, 392.
Kirkman v. Andrews, 457.
v. Snodgrass, 494.
Kirkpatrick v. Corning, 379.
v. White, 415.
Kirksey v. Means, 224, 264.
Kisor v. Stancifer, 213, 215.
Kitchell v. Burgwin, 522.
Kitchins v. Harrall, 30, 48.
Kittredge v. Bank, 509–511.
Kitts v. Willson, 354.
Klein v. Fleetford, 123.
Klepper v. Powell, 423.
Knapp v. Gass, 498.
Knickerbacker v. Harris, 136.
Knight v. Knight, 14, 19, 122, 284, 294.
Knowlton v. Hanbury, 524.
Knox v. Armistead, 242.
v. Smith, 189.
v. Spratt, 263.
v. Summers, 76.
Knye v. Moore, 343.
Koch v. Hubbard, 249.
Koerner v. Gauss, 36.
Kopper v. Dyer, 83.
Kornegay v. Carroway, 225, 227.
Koster v. Miller, 83.
Krippendorf v. Hyde, 127.
Krueger v. Ferry, 305, 306.
Kruson v. Kruson, 125.
Kuchenbeiser v. Beckert, 221.
Kunkel v. Markell, 171.
Kupferman v. McGehee, 223.
Kuypers v. Reformed Church, 370, 372, 373, 380, 386, 509, 511.

L

Labadie v. Hewitt, 246, 393.
Lackett v. Rumbaugh, 108.
Ladd v. Harvey, 223.
Lady Elibank v. Montolieu, 48.
Lady Shaftsbury v. Arrowsmith, 403, 513.
Lainhart v. Reilly, 237.
Laird v. Boyle, 223.
Lamb v. Boyd, 251.
v. Jeffrey, 193, 242, 378.
v. Laughlin, 190.
v. McConkey, 382.
v. Starr, 430.
Lambert v. Blumenthal, 245.
v. Lambert, 379, 380.
Lanchester v. Thompson, 35.
Land v. Cowan, 189.
Lane v. Marshall, 135.
v. Paul, 126.
v. Stebbins, 287.
Langdon v. Goddard, 190, 197, 218, 349.
v. Pickering, 503.
Lange, Ex parte, 311.
v. Jones, 18.
Langley v. Fisher, 459.
v. Jones, 243.
Langston v. Boylston, 278, 280, 281.
Langton v. Horton, 475.
Lansdale v. Smith, 493.
Lansing v. Russell, 116.
Larkins v. Biddle, 101, 104.
Larrison v. Railroad Co., 406.
Latham v. McGinnis, 494.
Lattin v. Hazard, 263.
Laughton v. Harden, 266, 269.
Lavenson v. Soap Co., 120.
Law v. Ford, 105.
v. Rigby, 461.
Lawrence v. Chase, 73.
v. Lawrence, 136, 137, 504.
v. Pool, 441.
Lea v. Robeson, 375.

[The figures refer to pages.]

Leacraft v. Demprey, 414.
Leather Manuf'rs' Nat. Bank v. Cooper, 27.
Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co., 33.
Ledsinger v. Central Line of Steamers, 144.
Ledwith v. City of Jacksonville, 294.
Lee v. Percival, 258.
v. Read, 402.
v. Stiger, 518.
Leeds v. Insurance Co., 137, 138, 426, 498.
Lefew v. Hooper, 379.
Legal v. Miller, 227.
Le Gendre v. Byrnes, 397, 398.
Leggett v. Postley, 512.
Legoux v. Wante, 513.
Lehigh Valley R. Co. v. McFarlan, 256.
Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co., 341.
Leicester Piano Co. v. Front Royal & Riverton Imp. Co., 157, 158.
Leigh v. Everheart, 512, 513.
Lembeck v. Nye, 121, 256.
Lenox v. Notrebe, 105.
v. Prout, 134.
Lenz v. Prescott, 341, 345.
Leonard v. Cook, 293, 295.
Lester v. Mathews, 153.
v. Stevens, 360.
Leverton v. Waters, 494.
Lewarne v. Improvement Co., 341.
Lewis v. Baird, 94, 443, 493.
v. Cocks, 9.
v. Lewis, 205.
v. Mason's Adm'r, 520.
v. Shainwald, 223, 230.
v. Yale, 137.
Lewisburg Bank v. Sheffey, 147, 149.
Lewiston Falls Manuf'g Co. v. Franklin Co., 222, 230, 234.
Ley v. Reitz, 266.
Lincoln v. Wright, 467.
Lindsay v. Hatch, 159.
Lindsley v. Personette, 372.
Ling v. Colman, 16.
Lingan v. Henderson, 190, 191, 215, 222, 223, 229, 438.
Litch v. Clinch, 518.
Litchfield v. Burwell, 71.
Livingston v. Gibbons, 75.
Livingston v. Hall, 251.
v. Harris, 512.
v. Hubbs, 313.
v. Livingston, 385, 451.
v. Story, 455, 493, 516.
v. Tompkins, 140, 512, 513.
Lloyd v. Brewster, 229, 334.
v. Johnes, 29, 30, 294.
v. Kirkwood. 397.
v. Loaring, 391.
Lockard v. Lockard, 190, 199, 335, 501.
Lockhart v. Horn, 84
Lodge v. Twell, 147.
Long v. Kee, 161.
v. Kinkel, 239.
v. McGregor, 233.
v. Majestre, 202.
Longworth v. Taylor, 68.
Loomis v. Brown, 51.
v. Fay, 136.
Lord Bath v. Sherwin, 125.
Lord Bernard's Case, 121.
Lord Keeper v. Wyld, 475.
Lord Portarlington v. Soulby, 438, 451, 466.
Lord Shipbrooke v. Lord Hinckinbrook, 165.
Lord Uxbridge v. Staveland, 201, 328, 337.
Lord Walpole v. Lord Orford, 227.
Lorentz v. Lorentz, 515.
Loucheim v. Bank, 269.
Loud v. Sergeant, 413.
Lovell v. Farrington, 191.
Lovett v. Association, 507.
Loving v. Fairchild, 429.
Low v. Mills, 70.
Lowe v. Morgan, 50.
v. Richardson, 280.
Lowry v. Naff, 494.
Lozier v. Van Saun, 278.
Lucas v. King, 245.
v. Oliver, 229.
Lucking v. Wesson, 200.
Luco v. De Toro, 246.
Ludington v. City of Elizabeth, 251.
Lumley v. Wagner, 120.
Lumsden v. Fraser, 346.
Lupton v. Johnson, 127.
v. Lupton, 276.
Lyell v. St. Clair Co., 273.
Lyman v. Alexander, 155.
v. Bonney, 54.

[The figures refer to pages.]

Lynchburg Iron Co. v. Tayloe, 31.
Lynde v. O'Donnell, 162.
Lyne v. Bank, 266.
Lyon v. Bolling, 518.
v. Brooks, 498.
v. Dees, 434.
v. Tevis, 16.
Lyons v. Van Riper, 302.

M

McAllister v. Clopton, 518.
v. Plant, 239.
McArthur v. Kelly, 124.
v. Scott, 31, 35.
McCabe v. Bellows, 26, 340.
v. Cooney, 498.
v. Mathews, 263.
McCagg v. Heacock, 499.
McCall v. Carpenter, 245.
McCalmont v. Lawrence, 273.
McCampbell v. Gill, 518.
McCarty v. Stanwix, 106.
McCaull v. Braham, 120.
McClaskey v. Barr, 96, 213, 219, 505, 516.
v. O'Brien, 202.
McClane v. White, 263.
McClane's Adm'x v. Shepherd's Ex'x, 524.
McCloskey v. Barr, 413, 416, 433, 434, 466.
v. McCormick, 387.
McClure v. Otrich, 493.
McClurg's Appeal, 120.
McComb v. Railroad Co., 17.
McConihay v. Wright, 8, 10.
McConnel v. Gibson, 222.
v. Smith, 499.
McConnell v. Hodson, 499.
v. McConnell, 228, 334.
McCord v. Iker, 121.
McCormick v. Chamberlin, 96, 432.
McCoy v. Boley, 185, 236.
v. Nelson, 272.
v. Rhodes, 135.
M'Crea v. Purmort, 207.
McCrum v. Lee, 223.
McCulla v. Beadleston, 171.
McCullough v. Colby, 275, 276.
McCully v. Peel, 498.
McDonald v. Flour-Mills Co., 455
McDonald v. Insurance Co., 84, 190.
v. McDonald, 136, 521.
v. Thompson, 115.
McDonnell v. Eaton, 341.
McDougald v. Dougherty, 101, 308.
McDowell v. Bank, 134.
v. Cochran, 378.
v. Goldsmith, 83.
McDuffee v. Sinnott, 247.
McElvey v. Lewis, 105.
McElwain v. Willis, 378.
McEvoy v. Trustees, 69.
McEwen v. Broadhead, 323, 426, 428, 461.
Macey v. Childress, 329, 389, 461.
McGehee v. Polk, 129.
McGhee v. Bank, 269.
McGilvray v. Avery, 470.
McGough v. Bank, 276.
McGowan v. James, 85.
McGowen v. Young, 499.
MacGregor v. East India Co., 17, 465, 466.
McGuckinn v. Kline, 494.
McGuire v. Circuit Judge, 308, 500.
v. Gallagher, 314.
v. Van Pelt, 243.
Machinists' Nat. Bank v. Field, 225.
McIntyre v. Mancius, 289.
v. Trustees, 508.
Mackall v. Casilear, 190, 224, 225.
McKay v. McNeill, 248.
McKee v. Insurance Co., 327.
McKeldin v. Gouldy, 273.
McKenzie v. Baldridge, 216, 236.
McKewan v. Sanderson, 429, 430.
McKim v. Mason, 98, 525.
v. Odom, 498.
v. Thompson, 108, 109.
McKinley v. Irvine, 54, 147, 197, 328.
McKleroy v. Tulane, 231.
McKnight v. Taylor, 477.
McLard v. Linnville, 496.
McLarren v. Thurman, 73.
McLean v. Bank, 107.
v. Barton, 397.
McMahon v. Rooney, 187, 268.
McMillin v. Transportation Co., 272.
McMullen v. Eagan, 500.
v. Furnass, 240.
v. Richie, 472.
McNair v. Biddle, 190, 222, 225.
McNairy v. Eastland, 274, 275.

[The figures refer to pages.]

McPherson v. Cox, 306.
McRae v. Singleton, 220.
McTighe v. Wadleigh, 109.
Madison, W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co., 415, 434.
Madox v. Jackson, 14, 26.
Magee v. Magee, 494.
Magill v. Trust Co., 144.
Magoun v. Insurance Co., 470.
Main v. Melbourn, 467.
Majors v. McNeilly, 237.
Malcolm v. Scott, 14.
Malcom v. O'Reilly, 199.
Malin v. Malin, 30.
Mallock v. Galton, 470, 471.
Mallory v. Mallory, 261.
Mallory Manuf'g Co. v. Fox, 159.
Mallow v. Hinde, 21, 22, 39, 43.
Malony v. Rourke, 321.
Mammoth Vein Consol. Coal Co.'s Appeal, 124.
Mandeville v. Riggs, 34, 44.
Manhattan Life Ins. Co. v. Broughton, 471.
Manion v. Fahy, 147.
Mann v. Betterly, 520.
v. Butler, 34.
v. State, 239.
Manning v. Drake, 188, 385, 450.
v. Fifth Parish, 193, 195.
v. Manning, 520.
Mansell v. Feeney, 127.
Mansfield v. Sherman, 261.
Manufacturers' Nat. Bank v. Baack, 185.
Many v. Iron Co., 17, 54, 340.
Mapes v. Coffin, 155.
Marble v. Bonhotel, 102.
March v. McNair, 257.
v. Mayers, 379.
Marden v. Babcock, 266, 269.
Mare v. Malachy, 16.
Margrave v. Le Hooke, 397.
Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co., 31.
Markell v. Kasson, 308.
Markham v. Markham, 48.
Marquis Cholmondeley v. Lord Clinton, 18.
Marsellis v. Banking Co., 324.
Marsh v. Davison, 140, 287.
v. Green, 15, 354.
Marsh v. Marsh, 368.
v. Mitchell, 138.
Marshall v. Beverley, 42.
v. Olds, 104.
v. Rench, 207, 211, 213
v. Turnbull, 187.
Marten v. Van Schaick, 105.
Martin v. Atkinson, 102.
v. Dryden, 34, 35.
v. Eversal, 101.
v. Fox, 268.
v. Gray, 71.
v. Hewitt, 216.
v. McBryde, 26, 43.
v. McReynolds, 32.
v. Martin, 231, 347.
Marye v. Root, 331.
Maryland Sav. Inst. v. Schroeder, 118.
Mason v. Gardiner, 406.
v. Goodburne, 284, 285.
v. Lake, 233.
v. McGirr, 498, 499.
v. Peck, 134.
v. Railroad Co., 524.
Massachusetts Mut. Life Ins. Co. v. Chicago & A. R. Co., 461.
Massie v. Graham, 314.
v. Watts, 389.
Massie's Heirs v. Donaldson, 83.
Masters v. Barnes, 298.
Masterson v. Craig, 495.
v. Howard, 46.
Match v. Hunt, 494.
Matthews v. Crockett's Adm'r, 266.
v. Dunbar, 103.
v. Manufacturing Co., 428, 525.
v. Roberts, 469.
v. Warner, 233.
Matthias v. Warrington, 227.
Mauney v. anufacturing Co., 45.
Maw v. Pearson, 202.
May v. Barnard, 137.
v. Fenton, 261.
v. Sloan, 493.
v. Thomson, 261.
v. Williams, 495, 505.
Mayer v. Association, 122.
v. Clark, 267.
Maynard v. Green, 293–295.
v. Pereault, 85.
Mayne v. Griswold, 228.
Mayor of York v. Pilkington, 255.

[The figures refer to pages.]

Mayor & Citizens of London v. Levy, 54, 210, 321, 325, 371.
Maywood Co. v. Village of Maywood, 52.
Mazyck v. McEwen, 109.
Mench v. Stone, 399.
Mead v. Day, 509, 518.
v. Merritt, 389.
Meade v. Beale, 9.
v. Finley, 354.
Meadors v. Askew, 197.
Meadows v. Duchess of Kingston, 472.
Mechanics' Bank v. Levy, 206, 213–215, 505, 508.
v. Seton, 27, 39.
Mechanics' Foundry v. Ryall, 121.
Meder v. Birt, 440.
Meier v. Kelly, 258, 259.
Mellendy v. Austin, 321.
Melton v. Withers, 346.
Mendizabel v. Machodo, 481.
Menier v. Telegraph Works, 34.
Menominie, The, 111.
Mercantile Trust Co. v. Kanawha & O. Ry. Co., 187, 193, 239.
Mercantile Trust Co. of New York v. Missouri K. & T. Ry. Co., 106.
Merchants' Nat. Bank v. Hogle, 225.
v. Raymond, 223, 239.
Merrewether v. Mellish, 463, 483.
Merriam v. Publishing Co., 370.
Merrifield v. Ingersoll, 378.
Merrill v. Allen, 191.
v. Bischoff, 37.
v. Town of Monticello, 397.
Merritt, In re, 107.
v. Brown, 327, 519.
v. Hughes, 246.
v. Lyon, 107.
Merrywether v. Mellish, 302.
Merserole v. Collar Co., 185.
Merwin v. Richardson, 305.
Metcalf v. Hervey, 282, 370, 371.
Methodist Episcopal Church v. Clark, 252.
v. Jaques, 213.
Metler v. Metler, 122, 385.
Metropolitan Ry. Co. v. Wright, 116.
Meux v. Maltby, 14, 25, 34, 44.
Mewshaw v. Mewshaw, 192.
Miami Exporting Co. v. United States Bank, 224.
Michigan State Bank v. Hastings, 39.
Michigan & Ohio Plaster Co. v. White, 278.
Micklethwait v. Micklethwait, 121.
Micou v. Ashurst, 229.
Middleton v. Booming Co., 188.
v. Flat River Booming Co., 211.
v. Selby, 500.
Miles v. Goodwin, 76.
v. Miles, 134, 138, 213, 509, 510.
v. Strong, 104.
Millard v. Hall, 267.
Millerd v. Ramsdell, 520.
Miller v. Avery, 507.
v. Bates, 233.
v. Bear, 37.
v. Clark, 293.
v. Davidson, 379.
v. Furse, 222.
v. Grandy, 49.
v. Jamison, 224.
v. Lehman, 268.
v. Lord, 222.
v. Luco, 251.
v. Miller, 247.
v. Railroad Co., 259.
v. Sharp, 285.
v. Whittaker, 16.
Miller-Magee Co. v. Carpenter, 388.
Milligan v. Milledge, 56, 237, 463.
v. Mitchell, 394.
Millington v. Millington, 246.
Mill River Loan Fund Ass'n v. Claflin, 366, 367.
Mills v. Gore, 138.
v. Hoag, 147, 148, 156.
Millsaps v. Pfeiffer, 288, 500.
Miltenberger v. Railroad Co., 18.
Minnesota Co. v. St. Paul Co., 294.
Minturn v. Seymour, 260.
Mitchell v. Green, 385, 451.
v. Hayne, 280.
v. Lenox, 463.
v. Maupin, 518.
v. Moore, 224.
Mitchener v. Robins, 57.
Missouri, K. & T. Ry. Co. v. Dinsmore, 148.
Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 411.
Mix v. People, 96, 97, 499, 506.
Mobile Sav. Bank v. Burke, 344.
Moeckly v. Gorton, 122.
Mohawk & H. R. Co. v. Clute, 281.

[The figures refer to pages.]

Mole v. Smith, 295.
Montague v. Lobdell, 37.
Montgomery v. McGee, 273.
v. Olwell, 85.
Moodalay v. Morton, 17.
Mooney v. Cooledge, 121.
Moore v. Armstrong, 381.
v. Bracken, 311.
v. Bush, 465.
v. Crawford, 263.
v. Dunn, 382.
v. Fitz Randolph, 201.
v. Floyd, 156.
v. Hinnant, 266.
v. Hudson, 234.
v. Huntington, 308.
v. Lockett, 518.
v. Lyttle, 396.
v. Martin, 113.
v. Munn, 20.
v. Perry, 312.
v. School Trustees, 20, 48.
v. Titman, 188, 239.
Moorer v. Moorer, 268.
Moores v. Townshend, 250.
Moors v. Moors, 505.
Moran v. Palmer, 190, 197, 222.
Mordaunt v. Marshall, 301.
Moreton v. Harrison, 416.
Morey v. Forsyth, 31.
Morgan v. Fillmore, 279.
v. Harris, 400, 478.
v. Marsack, 278.
v. Morgan, 20.
v. Smith, 190, 202, 305.
v. Thorne, 47.
v. Tipton, 134.
v. Wood, 266.
Morgan's Heirs v. Morgan, 23, 24.
Moriarty v. Ashworth, 120.
Morison v. Turnour, 433, 434, 467.
Morris v. Edwards, 403.
v. Hoyt, 517.
v. Morgan, 325.
v. Morris, 517.
v. Parker, 501.
v. White, 136.
Morrison v. Bowman, 223.
v. Durr, 134, 135.
v. Stewart, 135.
Morse v. Mill Co., 118.
Mortimer v. Hartley, 195.
Mortimer v. Orchard, 191.
Morton v. Waring's Heirs, 199.
Moses v. Gatliff, 250.
Mosgrove v. Kountze, 291.
Mosher v. Mosher, 313.
Moshier v. Knox College, 101, 102.
Moss v. Ashbrooks, 470.
Mossop v. Eadon, 231.
Mounsey v. Burnham, 354.
Mount v. Manhattan Co., 418.
Mt. Carbon Coal & Railroad Co. v. Blanchard, 52, 342, 344.
Mountford v. Taylor, 505.
Mount Holly L. & M. Turnpike Co. v. Ferree, 278, 281, 282.
Muckleston v. Brown, 214.
Mudge v. Hull, 23.
Muller v. Rhuman, 257.
Mulock v. Mulock, 131.
Mulvey v. Gibbons, 243.
Munch v. Shabel, 101, 102.
Mundy's Landing & H. Turnpike Co. v. Hardin, 223.
Munford v. Pearce, 224.
Munoz v. De Tastet, 43.
Murphy v. McVicker, 231.
Murray v. East India Co., 483.
v. Finster, 494.
v. Hay, 344.
v. King, 291.
Murrell v. Jones, 229.
Musselman v. Marquis, 121.
Mussina v. Bartlett, 159.
Mutual Life Ins. Co. v. Bigler, 120.
v. Corey, 250.
v. Pinner, 76.
v. Sturges, 85, 323.
Mutual Reserve Fund Life Ass'n v. Bradbury, 361.
Mutter v. Chauvel, 392.
Myers v. Dorr, 426, 428, 525.
v. Fenn, 127.

N

Nabob of Arcot v. East India Co., 454.
Naddo v. Bardon, 397.
Nagel v. Schneider, 257.
Nail v. Mobley, 342.
Nanney v. Totty, 405.
Nash v. Simpson, 245.

[The figures refer tc pages.]

Nashville, C. & St. L. Ry. Co. v. U. S., 155.
National Bank v. Carpenter, 377, 378, 429.
v. Insurance Co., 422, 423.
National Docks Ry. Co. v. Central R. Co. of New Jersey, 124.
National Ins. Co. v. Pingrey, 279, 281.
National Park Bank of New York v. Goddard, 256.
v. Halle, 374.
National Union Bank of Dover v. Reed, 268.
Naudain v. Ormes, 388.
Neafie v. Neafie, 145, 470, 471.
Neal v. Foster, 307, 308.
Neale v. Hagthrop, 510, 518.
Nebraska City Nat. Bank v. Nebraska City Hydraulic Gaslight & Coke Co., 389.
Nellson v. Churchill, 30.
Nelms v. Clark, 146.
Nelson v. Dunn, 305.
v. Ferdinand, 367.
v. Hill, 347.
Neubert v. Massman, 293.
Nevins v. McKee, 119.
Nevitt v. Bacon, 399.
v. Gillespie, 58.
New [illegible]. New, 54.
v. Wright, 105.
Newark Sav. Inst. v. Jones' Ex'rs, 32.
Newberry v. Blatchford, 16.
Newby v. Railway Co., 423.
Newcomb v. Horton, 34, 44.
Newell v. Board of Sup'rs, 374, 375.
New England Bank v. Lewis, 501.
Newhall v. Hobbs, 508.
v. Kastens, 278.
New Jersey Zinc Co. v. New Jersey Franklinite Co., 295.
Newland v. Rogers, 322, 397.
Newlands v. Paynter, 475.
Newman v. James, 136.
v. Wallis, 453, 457.
New Orleans Canal & Banking Co. v. Stafford, 27.
New Orleans Gaslight & Banking Co. v. Dudley, 468.
Newsome v. Bowyer, 47.
Newton v. Hull, 258.
v. Thayer, 423, 524.
New York v. Connecticut, 55.
Nichol v. Nichol, 500.
Nicholas v. Murray, 367, 396.
Nichols v. Padfield, 493.
v. Rogers, 187.
Niles v. Vanderzee, 71.
Nobel v. Cromwell, 247.
Noel v. Ward, 196.
Noel's Adm'r v. Noel's Adm'r, 147.
Nolley v. Rogers, 215, 320.
Norcom v. Rogers, 47.
Norfolk Trust Co. v. Marye, 118.
Norfolk & W. R. Co. v. Postal Tel. Cable Co., 514.
Norman v. Bennett, 263.
v. Hudleston, 499.
Norris v. Lemen, 326.
North v. Bradway, 59.
v. Gray, 285.
v. Kizer, 374.
North American Fire Ins. Co. v. Graham, 275.
Northern Pac. R. Co. v. Amacker, 253.
v. Roberts, 372.
Northey v. Northey, 28.
Northrop v. Boone, 261.
v. Hatch, 140.
Northwestern Bank v. Nelson, 512.
Norton v. Warner, 510.
v. Woods, 504.
Norway v. Rowe, 106.
Norwood v. Riddle, 71.
Noyes v. Willard, 413, 417, 418.
Noysomhed, The, 390.
Nudd v. Powers, 224.
Nunez v. Morgan, 261.
Nusbaum v. Stein, 107.
Nye v. Swan, 242.

O

Oakey v. Bend, 48.
Oakley v. Hurlbut, 252.
O'Brian v. Fry, 135.
O'Brien v. Hulfish, 494.
Odom v. Owen, 500.
O'Donnell v. Poike, 268.
Ogilvie v. Herne, 81.
v. Insurance Co., 147.
O'Hara v. MacConnell, 83.
O'Hare v. Downing, 97.
Ohio Cent. R. Co. v. Central Trust Co. of New York, 83, 84.

[The figures refer to pages.]

Oil Co. v. Petroleum Co., 106.
Olden v. Hubbard, 397, 398.
Oldham v. Eboral, 301.
Oliver v. Chemical Works, 109 U. S. 75, 82, 3 Sup. Ct. 61, 324.
v. Haywood, 200, 205.
v. Palmer, 230.
Omaha Horse Ry. Co. v. Cable Tramway Co., 221.
O'Neal v. Robinson, 216.
Ontario Bank v. Mumford, 31.
v. Root, 493.
Oppenheim v. Wolf, 278.
Orcutt v. Orms, 432.
Ord v. Huddleston, 457.
v. Noel, 313.
Orr v. Hodgson, 46.
Ortley v. Messere, 47.
Osborn v. Bank, 55, 76, 137.
Osborne v. Prather, 251.
v. Usher, 29.
Otis v. Forman, 163.
Outwater v. Berry, 372.
Owen v. Ford, 424.
v. Moore, 198.
Oyster v. Oyster, 144, 470.

P

Pacific R. R. v. Ketchum, 38, 149.
v. Missouri Pac. Ry. Co., 72, 73.
Pagan v. Sparks, 29.
Page v. Martin, 261.
v. Montgomery, 252.
v. Telegraph Co., 127.
Paige v. Banks, 121.
v. Broadfoot, 216, 496.
Paine v. Warren, 126.
Palk v. Clinton, 190, 223.
Palmer v. Carlisle, 50.
v. Rich, 199.
v. Stevens, 43.
v. Truby, 108.
Pardridge v. Brennan, 235.
Park v. Wiley, 108.
Park Bros. & Co. v. Blodgett & Clapp Co., 258.
Parke v. Brown, 251, 252, 305.
Parker v. Barker, 281.
v. Carter, 215.
v. Cochran, 395.
v. Dacres, 70, 242.
Parker v. Grammer, 161.
v. Hartt, 494.
v. Jameson, 494.
v. Lincoln, 15, 54.
v. Nickerson, 114.
v. Parker, 106, 453, 494.
v. Phetteplace, 135.
v. Spencer, 381.
v. Town of Concord, 144.
Parkes v. Clift, 383.
Parkhurst v. Kinsman, 121.
Parkinson v. Trousdale, 505.
Parkman v. Welch, 136.
Parks v. Booth, 111, 494.
Parmer's Adm'r v. Parmer, 243.
Parsons v. Cumming, 218.
v. Heston, 190.
v. Howard, 40, 41.
v. Robinson, 147, 149.
Parton v. Prang, 423, 426.
Partridge v. Haycraft, 175, 208, 210, 314.
Patrick v. Isenhart, 223.
Patterson v. Ingraham, 375.
v. McCamant, 255.
Pattison v. Hull, 306.
v. Powers, 240.
Patton v. Brunswick & Balke Co., 144.
v. Crumpler, 252.
v. Wagner, 244.
Paul v. Lord Clinton, 190.
Pawlak v. Granowski, 263.
Pawlet v. Bishop of Lincoln, 28.
Paxton v. Douglas, 401, 402.
Payne v. Avery, 393.
v. Bank, 76.
v. Berry, 362.
v. Compton, 475.
v. Cowan, 305.
v. Frazier, 498.
v. Hook, 19, 25.
Paynes v. Coles, 135.
Peacock v. Peacock, 105.
v. Terry, 101, 189.
Pearce v. Rice, 428.
Pease v. Pease, 289, 385, 451.
Peck v. Crane, 123.
v. Elder, 53.
v. Malloms, 203.
v. Peck, 223, 227.
Pedrick v. White, 291.
Peek v. Wright, 227.
Peeples v. Peeples, 494.

[The figures refer to pages.]

Peer v. Cookerow, 209.
Pegg v. Davis, 83.
Pelletreau v. Rathbone, 196
Pendleton v. Dalton, 471.
v. Evans, 83.
v. Fay, 302.
Pennington v. Alvin, 48.
v. Beechey, 476.
v. Gittings, 136.
Pennock v. Ela, 225, 228.
Pennoyer v. Neff, 72.
Penny v. Watts, 19, 394.
Pennybacker v. Laidley, 266.
Pensenneau v. Pensenneau, 229.
People v. Gates, 141.
v. Harris, 141.
v. Sturtevant, 33, 44.
Peoples v. Stanley, 70.
Peoria, D. & E. Ry. Co. v. Pixley, 58.
Perine v. Dunn, 471.
Perkins v. Fourniquet, 147.
v. Hendryx, 77.
Perrat v. Ballard, 475.
Perry v. Carr, 231, 242, 321.
v. Jenkins, 483.
v. Littlefield, 363.
v. Perry, 221, 331.
v. Phelips, 313, 315, 316.
Petch v. Dalton, 16.
Peters v. Canfield, 263.
Petree v. Brotherton, 268.
Petrie v. Petrie, 31.
Pettibone v. Hamilton, 51.
v. McGraw, 34.
Petty v. Fogle, 339, 345.
Pfister v. Wade, 281.
Pharis v. Leachman, 273.
Phelps v. Sproule, 299, 301, 472–474.
Philips v. Langhorn, 427.
Phillips v. Pullen, 119, 266.
v. Schooley, 193, 326.
Phœnix v. Dey, 137.
Phœnix Ins. Co. v. Day, 370, 372.
v. Wulf, 71, 72, 74.
Phœnix Mut. Life Ins. Co. v. Batchen, 37.
Phyfe v. Wardell, 260.
Platt v. Oliver, 32, 413, 493.
Pickens v. Knisely, 226.
Pickering v. Rigby, 127.
Pickford v. Hunter, 461, 470.
Picquet v. Swan, 72.
Pierce v. Hunter, 251.
Pierce v. McClellan, 493.
v. Rollins, 245.
Pierpont v. Fowle, 492.
Pierson v. Robinson, 56.
Pillow v. Pillow, 228.
v. Sentelle, 307.
Pinchin v. Railway Co., 124.
Pinkston v. Taliaferro, 104.
Pinkus v. Peters, 292.
Piper v. Douglas' Ex'r, 321.
Pisani v. Lawson, 46.
Pittman v. McClellan, 85.
Pittsburg, C., C. & St. L. Ry. Co. v. O'Brien, 250, 251.
Place v. City of Providence, 519.
Planters' & Merchants' Bank of Mobile v. Walker, 347.
Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank, 360.
Platto v. Deuster, 120.
Plaut v. Plaut, 236.
Playford v. Lockard, 445.
Pleasants v. Glasscock, 226, 340.
Plumbe v. Plumbe, 201.
Plumley v. Plumley, 378.
Plummer v. May, 16, 459.
Plunket v. Penson, 19, 43.
Pomeroy v. Fullerton, 262, 263.
v. Winship, 113.
Ponsford v. Hankey, 201.
Pool v. Lloyd, 385.
Poore v. Clark, 15.
Pope v. Inhabitants of Halifax, 16.
v. Leonard, 23, 371.
Poppenhusen v. Falke, 271, 272.
Popplein v. Foley, 261.
Portarlington v. Soulby, 451.
Portington v. Tarbock, 283.
Post v. Railroad Co., 17, 370.
Potier v. Barclay, 293.
Pott v. Gallini, 319.
Potter v. Gardner, 28.
Poultney v. City of Lafayette, 423.
Powder Co. v. Powder Co., 363, 379.
Powell v. Earl of Powis, 255.
v. Young, 224, 264.
Powles v. Dilley, 138.
Poythress v. Poythress, 106.
Pratt v. Bacon, 379.
v. Lewis, 368.
Pray v. Belt, 34.
Prentice v. Kimball, 20, 26, 463.
Preschbaker v. Feaman's Heirs, 135.

[The figures refer to pages.]

President, etc., of Bank of U. S. v. Beverly, 494.
President, etc., of Town of Tamaroa v. Trustees of Southern Illinois Normal University, 364.
President, etc., of Tradesmen's Bank v. Hyatt, 510.
President, etc., of Union Bank of Maryland v. Kerr, 234.
Preston v. Finley, 367.
v. Fitch, 298.
v. Smith, 287, 375, 385.
v. Walsh, 22.
Prettyman v. Barnard, 499.
Prewit v. Graves, 221.
Price v. Berrington, 189.
v. Blackmore, 499.
v. Coleman, 341.
v. Keyte, 315.
v. Lytton, 138.
v. Mayor, etc., of Penzance, 261.
v. Price, 106, 476.
Prichard v. Littlejohn, 245, 246, 306.
Prince Albert v. Strange, 121.
Pringle v. Crooks, 395.
Privett v. Calloway, 146.
Probert v. McDonald, 268.
Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 132.
Proudfit v. Picket, 75, 76.
Prout v. Roberts' Adm'r, 136.
v. Roby, 41.
Providence Bank v. Wilkinson, 279.
Pryor v. Hollinger, 242.
Puckette v. Judge, 124.
Puget Sound Nat. Bank of Seattle v. King Co., 374.
Pugsley v. Trust Co., 75.
Pulliam v. Christian, 148.
Pullman Palace-Car Co. v. Central Transp. Co., 307.
Pullman's Palace-Car Co. v. Missouri Pac. Ry. Co., 375.
Pulteney v. Shelton, 120.
Purdy v. Henslee, 305, 499.
Purefoy v. Purefoy, 322, 397.
Pusey v. Desbouvrie, 472.
v. Pusey, 261.
Puterbaugh v. Elliott, 379.
Putnam v. Clark, 311.
v. Day, 313.
v. Grand Rapids, 52.
Putney v. Whitmire, 293.
Pyle v. Price, 395.
Pyles v. Furniture Co., 340.

Q

Queen of Portugal v. Glyn, 463.
Quick v. Lemon, 307.
Quin v. Brittain, 232, 243.
Quint v. Little, 434.

R

Racine & M. R. Co. v. Farmers' Loan & Trust Co., 240.
Radford v. Folsom, 88.
Raffety v. King, 395.
Railroad Co., Ex parte, 306, 308.
v. Howard, 34.
v. Mellon, 134.
v. Orr, 19, 34.
v. Swasey, 147.
Rainier v. Howell, 331.
Ramsay v. Bell, 246.
Randall v. Mumford, 295.
v. Phillips, 135.
Randolph v. Daly, 347.
Randolph's Adm'x v. Kinney, 254.
Ransom's Ex'rs v. Geer, 184, 235, 236.
Raper v. Sanders, 224.
Rapier v. Paper Co., 193, 197.
Rawlings v. Dalton, 463.
Ray v. Ferrell, 257.
v. Law, 311.
Raymond v. Shawboose, 200.
Rea v. Longstreet, 249.
Read v. Hambey, 407.
v. Robb, 155.
v. Rowan, 23.
Reading v. Stover, 361, 372.
Redding v. Wilkes, 329.
Red Jacket Tribe v. Hoff, 388.
Reed v. Insurance Co., 509, 510.
v. Kemp, 305.
v. Reed, 341.
Reed's Appeal, 134.
Reeg v. Burnam, 191, 265.
Rees v. Peltzer, 20.
v. Shepherdson, 226.
Reeve v. Dalby, 470.
Reeves v. Adams, 16.
v. Baker, 349.

[The figures refer to pages.]

Reid v. McCallister, 520.
v. Stewart, 299.
Reissner v. Anness, 418.
Remeau v. Mills, 193.
Remer v. McKay, 250.
Renfro v. Goetter, 305.
Rennie v. Crombie, 227.
Reppller v. Buck, 224.
Reynolds v. Reynolds' Ex'r, 313.
v. Sumner, 398.
Reynoldson v. Perkins, 29.
Rhode Island v. Massachusetts, 341, 411, 416, 440, 441, 525.
Rhodes v. Cousins, 274, 275.
Ricardo v. Garcias, 470.
Rice v. Gordon, 126.
v. Hosiery Co., 187, 209.
Richard v. Evans, 327.
Richards v. Butcher, 195.
v. Jackson, 141.
v. Pierce, 347.
v. Railway Co., 199.
v. Richards, 331.
v. Salter, 278, 281.
v. West, 159.
Richardson v. Brooks, 342.
v. Green, 196.
v. Hastings, 54.
Richman v. Donnell, 308.
Richmond v. Atwood, 147.
Richter v. Jerome, 286.
Rico v. Gualtier, 128.
Riddle's Estate, 311.
Ridenour v. Shideler, 32.
Ridgeway v. Toram, 211.
Ridings v. Johnson, 158.
Riegel v. Insurance Co., 520.
Rienzle v. Barker, 510.
Rigg v. Hancock, 224, 227.
Riley v. Carter, 329.
v. Lyons, 471.
Rindskopf v. Platto, 287.
v. Vaughan, 266.
Ringgold v. Barley, 156.
Riopelle v. Doellner, 288.
Ripple v. Ripple, 391.
Ritchie v. Aylwin, 433.
v. Dorland, 255.
Rives v. Walthall's Ex'rs, 276.
Roach v. Chapin, 378.
Robbins v. Arnold, 21.
v. Davis, 127.
Roberts v. Birgess, 520.
Roberts v. Clayton, 202.
v. Evans, 47.
v. Madocks, 433.
v. Marchant, 20, 23, 24.
v. Miles, 135.
v. Roberts, 197.
v. Starke, 394.
v. Stoner, 161.
Robertson v. Carson, 19.
Robinson v. Guild, 371.
v. Holt, 265.
v. Howard, 383.
v. Robinson, 327, 341.
v. Sampson, 137.
v. Smith, 45, 394, 463.
v. Thompson, 369.
v. Woodgate, 509.
Roby v. Cossitt, 376.
Roche v. Morgell, 410, 412, 440, 441, 472.
Rockford Watch Co. v. Manifold, 269.
Roemer v. Conlon, 259.
Rogers v. Atkinson, 101, 104.
v. Insurance Co., 31, 48.
v. McMachan, 307.
v. Miller, 251.
v. Mitchell, 135.
v. Rathbun, 233.
v. Rogers, 33.
Rogers Locomotive & Machine Works v. Erie Co., 118
Romaine v. Hendrickson's Ex'rs, 217.
v. Insurance Co., 77.
Roosevelt v. Ellithorp, 126.
Root v. Railway Co., 270.
Ropes v. Upton, 120.
Rose v. Woodruff, 82.
Rosenstein v. Burns, 340, 342.
Ross v. Carpenter, 100.
v. City of Ft. Wayne, 295.
v. Crary, 34.
v. Hatfield, 299, 302.
v. Prentiss, 312.
v. Purse, 260.
v. Railway Co., 261.
v. Ramsey, 247, 248.
Rosse v. Rust, 469.
Rouse v. Martin, 121.
Rouskulp v. Kershner, 360.
Rowan v. Bowles, 190, 191, 499.
v. Kirkpatrick, 377.
Rowe v. ——, 287.
v. Teed, 413, 467.

[The figures refer to pages.]

Rowley v. Eccles, 381.
v. Van Benthuysen, 147, 156.
Rowley's Appeal, 520.
Royle v. Wynne, 462.
Rozier v. Griffith, 248.
Rubber Co. v. Goodyear, 73.
Rucker v. Dooley, 251.
Ruhlig v. Wiegert, 130.
Runner v. White, 22.
Russel v. Lanier, 372.
Russell v. Clark, 43. 394.
v. Dickeschied, 288.
v. Sharp, 295.
Russell & Erwin Manuf'g Co. v. Mallory, 505.
Rust v. Rust, 500.
Rutherford v. Jones, 245.
Ryan v. Duncan, 493, 494.
v. Lynch, 20, 26.
v. Melvin, 96, 506.
Ryan's Adm'r v. McLeod, 148.
Rylands v. Latouche, 27, 301.

S

Sackvill v. Ayleworth, 196.
Saffold v. Horne, 522.
St. Louis, I. M. & S. R. Co. v. Southern Exp. Co., 148.
St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 341, 398.
St. Louis & S. F. R. Co. v. Johnston, 187.
St. Paul Division No. 1 v. Brown, 262.
St. Romes v. Cotton-Press Co., 144.
Salkeld v. Science, 414, 421.
Salles v. Butler, 157.
Salmon v. Clagett, 135, 498, 505.
v. Dean, 415.
Saltmarsh v. Bower, 503.
Saltus v. Tobias, 416–418, 498.
Samis v. King, 54.
Samples v. Bank, 493, 515, 516.
Sampson v. Swettenham, 126.
Sanborn v. Adair, 518.
v. Dwinell, 346.
v. Kittredge, 520.
Sanderlin v. Sanderlin, 510.
v. Thompson, 295.
Sanders v. Burk, 314.
v. Devereux, 245.
v. King, 435, 457, 459, 472.
Sanderson v. Stockdale, 274.
Sanderson's Adm'rs v. Sanderson, 361.
Sandford v. Flint, 232.
v. Sinclair, 107.
Sands v. Beardsley, 114.
Sankey v. Seipp, 250.
Santee River Cypress Lumber Co. v. James, 113.
Sapp v. Phelps, 50.
Sargent v. Larned, 520.
Saumarez v. Saumarez, 18.
Saunders v. Allen, 494.
v. Frost, 292.
Savage v. Benham, 501.
Savannah & M. R. Co. v. Lancaster, 184, 188, 209.
Savory v. Dyer, 223, 230.
Sawyer v. Harrison, 267.
v. Hovey, 257.
Sawyers v. Baker, 24.
Saxton v. Stowell, 169.
Sayre v. Grymes, 156.
Scanlan v. Murphy, 267.
v. Scanlan, 502.
Schaefer v. Wunderle, 312.
Schenck v. Conover, 162.
Schmidt v. Mackey, 240.
Schneider v. Seibert, 247.
School Dist. No. 1 v. Weston, 278.
School Trustees v. Braner, 20.
v. Wright, 493.
Schultz v. Winter, 52.
Schuyler v. Hoyle, 47.
Schwarz v. Sears, 109, 499.
v. Wendell, 135, 138, 473, 522.
Scofield v. City of Lansing, 19, 51.
Scott v. Gamble, 227.
v. Harris, 101.
v. McFarland, 276.
v. McMillen, 274.
v. Moore, 20, 25.
v. Neely, 114.
v. Nicholl, 30.
v. Sells, 239, 328.
Search v. Search, 54.
Search's Adm'r v. Search's Adm'rs, 331.
Searight v. Payne, 415.
Sears v. Carrier, 399.
v. Hardy, 20, 31, 32.
v. Hyer, 495.
Seaton v. Grant, 197.
Seawright v. Parmer, 243.

[The figures refer to pages.]

Seborn v. Beckwith, 104.
Secor v. Singleton, 367, 422.
Sedgwick v. Cleveland, 205.
Seebold v. Lockner, 525.
Seeley v. Price, 379.
Segee v. Thomas, 237.
Selby v. Crew, 140.
Sell v. Bailey, 268.
Sellers v. Parvis & Williams Co., 121.
Sellon v. Lewen, 432.
Senhouse v. Earl, 471.
Sewall v. Glidden, 265.
Seymour v. Bailey, 46.
v. Dock Co., 379.
v. Edwards, 185.
v. Freer, 24.
Shackell v. Macaulay, 343.
Shæffer v. Weed, 524.
Shaft v. Insurance Co., 165.
Shainwald v. Lewis, 223, 230, 298.
Shannon v. Erwin, 190.
v. Hanks, 107.
Shapley v. Rangeley, 250.
Sharon v. Hill, 416–418.
v. Tucker, 255.
Sharp v. Taylor, 234.
Sharpe v. King, 398.
Shaw v. Bill, 295.
v. Chase, 370.
v. Coster, 280–282.
v. Railroad Co., 33.
Shed v. Garfield, 213, 218, 239, 240.
Sheets v. Selden, 230.
Sheffield Furnace Co. v. Witherow, 367.
Shelby v. Tardy, 224, 226.
Sheldon v. Aland, 316, 317.
Shelton v. Tiffin, 76.
Shenandoah Val. R. Co. v. Dunlop, 224, 264.
Shepard v. Railroad Co., 57.
v. Shepard, 187.
Shepherd v. Lloyd, 373.
v. Morris, 180.
Sheppard v. Starke, 222.
Sherer v. Garrison, 246.
Sheridan v. Cameron, 235, 236.
Sherman v. Parish, 31.
Shew v. Hews, 268.
Shickle v. Foundry Co., 341.
Shields v. Barrow, 21, 22, 38, 39, 100, 101.
v. Thomas, 76.
Shields v. Trammell, 221, 227.
Shinn v. Smith, 148.
Shipman v. Furniss, 370, 371.
Shoemaker v. Gardner, 37.
Short v. Kieffer, 187.
Shotwell's Adm'x v. Smith, 288.
Showell v. Winkup, 196.
Shuee v. Shuee, 231.
Shuttleworth v. Laycock, 397.
Sibbald v. U. S., 311.
Sibbering v. Earl of Balcarras, 184.
Sides v. Scharff, 269.
Sidney v. Sidney, 189.
Sigman v. Lundy, 308.
Sill v. Ketchum, 32.
Silsbee v. Smith, 242.
Silva v. Rankin, 121.
Silver Lake Bank v. North, 45.
Simmons v. Inhabitants of Hanover, 16.
v. Jacobs, 110, 111.
v. Williams, 227.
Simms v. Thompson, 311.
Simonson v. Blake, 241.
Simplot v. Simplot, 224.
Simpson, Ex parte, 348.
v. Brown, 126.
v. Burton, 186.
v. Wallace, 346.
Sims v. Lyle, 430, 443, 446.
Singer Manuf'g Co. v. Domestic Sewing-Machine Co., 122.
Singleton v. Gayle, 137.
Siren, The, 55.
Skeeles v. Shearly, 475.
Skiles v. Switzer, 20.
Skinner v. Bailey, 189, 190.
v. Judson, 512.
Slack v. Walcott, 299, 300.
Slason v. Wright, 138, 308.
Slater v. Banwell, 507, 513.
v. Maxwell, 98.
Slemmer's Appeal, 121.
Slessinger v. Buckingham, 217.
Slingsby v. Boulton, 278.
Sloan v. Graham, 493.
v. Little, 510.
v. Sloan, 250–252.
Sloman v. Kelly, 512.
Small v. Sanders, 122, 271.
Small v. Matrix Co., 122.
Smets v. Williams, 482.
Smillie v. Siler's Adm'r, 510.

[The figures refer to pages.]

Smith v. Austin, 103, 326.
v. Axtell, 190.
v. Babcock, 102, 103.
v. Brittenham, 16, 31, 48.
v. Brush, 134.
v. Burnham, 189.
v. City of Portland, 38.
v. Clark, 207, 496.
v. Clay, 477.
v. East India Co., 403.
v. Ewing, 518.
v. Hawkes, 22.
v. Hichman, 493.
v. Hollenback, 16.
v. Insurance Co., 83, 492, 506, 518.
v. Lasher, 501, 510.
v. Loomis, 501.
v. McDowell, 506.
v. McNeal, 471.
v. Pratt, 246.
v. Rotan, 20, 26.
v. Rumsey, 51.
v. Sackett, 50.
v. Smith, 190, 221, 225.
v. Swormstedt, 34, 44.
v. Target, 278, 280.
v. Thompson, 274.
v. West, 306, 499.
v. Williams, 34.
v. Wood, 187.
Snavely v. Harkrader, 394.
Snead v. McCoull, 101, 104.
Sneed v. Ewing, 113.
v. Town, 98.
Snelgrove v. Snelgrove, 475, 476.
Snell v. Loucks, 115, 116.
Snodgrass v. Andrews, 346.
v. Butler, 280.
Snow v. Counselman, 370.
v. Manufacturing Co., 493.
v. Wheeler, 35.
Snyder v. Cabell, 121.
v. Martin, 138.
Society for Propagation of Gospel v. Town of New Haven, 45.
Sohier v. Williams, 29.
Soltau v. De Held, 121.
Somerville v. Mackay, 126.
Sommers v. Torrey, 349, 503.
Souillard v. Dias, 299.
Southard v. Russell, 311, 313.
South Carolina Bank v. Case, 45.
Southern Life Ins. Co. v. Lanier, 373.
Southern Nat. Bank v. Darling, 8.
Southmayd v. Elizabeth, 251.
v. Jackson, 59.
South Park Com'rs v. Kerr, 190.
South Sea Co. v. Wymondsell, 466.
Souza v. Belcher, 385, 450.
Souzer v. De Meyer, 443.
Sowton v. Clerke, 283.
Spaeth v. Barney, 272.
Spangler v. Spangler, 360, 413.
Spear v. Campbell, 20.
v. Joyce, 266.
Speights v. Peters, 106.
Sperry v. Miller, 482.
Spies v. Railroad Co., 190.
Spofford v. Manning, 354.
Spragg v. Binkes, 29.
Sprague v. Rooney, 261.
v. Shields, 201.
v. West, 278.
Spring v. Gray, 466.
v. Sandford, 47.
Stadler v. Hertz, 495.
Stafford v. Brown, 96, 207, 217, 507.
v. Bryan, 134.
v. City of London, 394.
v. Howlett, 291–293, 405.
Stafford Nat. Bank v. Sprague, 342.
Stainton v. Chadwick, 513, 514.
Standard Oil Co. v. Southern Pac. Co., 127.
Standard Paint Co. v. Reynolds, 271.
Standish v. Radley, 311.
Stanley v. Holliday, 250, 253.
v. Valentine, 225.
Stapilton v. Stapilton, 221, 227.
Stark v. Hillibert, 524.
Starkie v. Richmond, 118.
Starne v. Farr, 38.
State v. Black River Phosphate Co., 203.
v. Brown, 345.
v. Grant, 68.
v. Jacksonville, P. & M. R. Co., 125.
v. Jenkins, 384.
v. Johnson, 68.
v. Rosenfeld, 267.
v. Wright, 59.
State Ins. Co. v. Gennett, 280.
State of California v. Southern Pac. Co., 21.

[The figures refer to pages.]

State of Rhode Island v. State of Massachusetts, 103.
Statham v. Dusy, 253.
Steam-Gauge & Lantern Co. v. McRoberts, 272.
v. Meyrose, 471.
Stearns v. Page, 441, 443.
v. Stearns, 134.
Stebbins v. Niles, 473
Steele v. Grove, 23.
Steere v. Bigelow, 274.
Stein v. Robertson, 228, 335.
Steinau v. Gas Co., 119.
Stephens v. Beal, 275.
v. Overstolz, 372.
v. Soule, 263.
Stephenson v. Davis, 66, 67, 72, 388.
Sterling v. Klepsattle, 201.
Sterrick v. Pugsley, 185.
Stevens v. Cooper, 467.
v. Enders, 247.
v. Guppy, 190, 224, 264.
v. Hayden, 171.
v. Hey, 314.
v. Nisbet, 108.
v. Post, 136.
Stevenson v. Austin, 15, 29.
v. Mathers, 23.
Steves v. Appleton, 389.
Steward v. Stevens, 268.
Stewart v. Chadwick, 184.
v. Drasha, 401.
v. Masterson, 370, 372, 373.
v. Stone, 137.
Stillwell v. M'Neely, 31, 372.
Stimson v. Lewis, 44.
Stinson v. Williams, 274.
Stitt v. Hilton, 96, 97.
Stockton v. Williams, 251.
Stone v. Anderson, 70, 204, 205, 224, 226, 227, 274, 275.
v. Moore, 360, 499, 501, 502, 506.
v. Morgan, 157.
v. Reed, 281.
v. Smoot, 499.
Stooke v. Vincent, 458.
Stookey v. Carter, 52.
Storms v. Storms, 524.
Storrs v. Railroad Co., 254.
Story v. Lord Windsor, 476.
Stout v. Cook, 494.
v. Lye, 88.
Stovall v. Banks, 149.
Stow v. Russell, 374, 375.
Strange v. Watson, 228, 229.
Stratford v. Hogan, 513.
Straughan v. Hallwood, 294.
v. Wright, 245.
Straus v. Barnett, 121.
v. Weil, 76.
Strickland v. Fitzgerald, 199.
v. Mackenzie, 430.
Strike's Case, 132.
Stringer v. Anderson, 151.
Stroehe v. Fehl, 332.
Strong v. Waterman, 44.
Strother v. Lovejoy, 187, 222.
Struble v. Neighbert, 239.
Stuart v. Coalter, 245.
Stucky v. Stucky, 190, 320.
Sturgeon v. Burrall, 29.
Sturges v. Longworth, 54.
Sullivan v. Railroad Co., 493.
v. Redfield, 271.
Supreme Lodge Knights of Honor v. Nairn, 278.
Surget v. Byers, 355.
Sutton v. Scarborough, 465.
Suydam v. Broadnax, 8.
v. Dequindre, 18.
v. Insurance Co., 276.
v. Johnson, 423.
Svanoe v. Jurgens, 157.
Swan v. Porter, 184.
Sweeney v. Coffin, 75.
Swetland v. Swetland, 188.
Swift v. Arents, 276.
v. Eckford, 379.
v. Lumber Co., 14.
Swinney v. Beard, 365.
Symes v. Magnay, 279.

T

Tabor v. Cook, 252.
Talbot v. Bowen, 493.
Tallmadge v. Lovett, 373.
Tallman v. Railroad Co., 72.
Talmage v. Pell, 234.
Tappan v. Evans, 113, 274, 275, 293.
v. Smith, 295.
v. Water-Power Co., 354.
Tarbell v. Durant, 227.
Tarleton v. Barnes, 428.
v. Hornby, 457.
v. Vietes, 467, 493, 499.

[The figures refer to pages.]

Tasker v. Small, 345.
Tate v. Connor, 518.
v. Railroad Co., 53.
Tavenner v. Barrett, 231.
Tayloe v. Insurance Co., 224.
Taylor v. Baldwin, 107.
v. Brown, 367.
v. Cornelius, 469.
v. Hearn, 240.
v. Holmes, 36, 38, 365, 366, 375, 387.
v. Luther, 501, 510.
v. Neate, 105.
v. Satterthwaite, 279, 280.
v. Snyder, 233.
Teale v. Teale, 284.
Teasdale v. Atkinson, 265.
Tench v. Cheese, 351.
Tennent v. Barksdale, 375.
Terrell v. Allison, 162, 163.
Terry v. Fontaine's Adm'r, 83.
v. Rosell, 229, 334.
Texas v. Hardenberg, 224.
Thatcher v. Humble, 121.
Thayer v. Lane, 190, 222, 371.
v. Turner, 232.
Thielman v. Carr, 305, 490.
Thomas v. Adams, 273.
v. Austin, 207.
v. Beals, 231.
v. De Baum, 163.
v. Garvan, 248.
v. Harvie's Heirs, 314.
v. Hawkins, 118.
v. Warner, 189.
Thomas Huston Electric Co. v. Sperry Electric Co., 127.
Thomason v. Smithson, 226.
Thomas' Trustees v. Brashear, 360.
Thompson, In re, 108.
v. Allen County, 10.
v. Heywood, 223, 224.
v. Hudson, 354.
v. Iron Co., 211.
v. Maxwell, 153, 314.
v. Smith, 163.
v. Wooster, 79.
Thompson's Appeal, 171, 187, 188.
Thompsonville Scale Manuf'g Co. v. Osgood, 258.
Themson v. Dean, 147.
v. Wooster, 6, 83, 84.
Thorn v. Germand, 101.
Thorne v. Tanning Co., 461.
Thornton v. Railroad Co., 216.
Thouvenin v. Heizle, 135.
Threlkel v. Scott, 268.
Thring v. Edgar, 435, 457, 466, 467, 476.
Tibbals v. Sargeant, 107.
Tibbetts v. Perkins, 114.
Tibbs v. Allen, 246.
Tillman v. Thomas, 370.
Tilton v. Barrell, 471.
Tinney v. Stebbins, 245.
Tirrell v. Merrill, 288.
Titsworth v. Stout, 499.
Titterton v. Osborne, 391.
Tobin v. Walkinshaw, 43.
Todd v. Gee, 400, 451.
v. Sterrett's Legatees, 17, 135.
Tolleston Club of Chicago v. Clough, 251.
Tomlinson v. Ward, 105.
Tompkins v. Anthon, 98, 525.
v. Mitchell, 494.
Tompson v. Bank, 375.
Tong v. Marvin, 48, 49, 191.
Torrent v. Booming Co., 249.
Towle v. Pierce, 39, 43.
Towne v. Smith, 134.
Town of Mt. Morris v. King, 398.
Town of Rutland v. Paige, 306.
Town of Virden v. Needles, 42.
Townsend v. Auger, 19.
v. Champernowne, 24.
v. Odam, 289.
v. Graves, 113.
v. Townsend, 157, 430.
Townshend v. Duncan, 207, 210, 222-224.
Tracey v. Sacket, 267.
Traders' Bank v. Campbell, 38, 43.
Trafford v. Wilkinson, 363.
Traphagen v. Voorhees, 313.
Travers v. Ross, 360.
Treadwell v. Brown, 225, 228.
v. Cleaveland, 69, 75.
v. Cleveland, 218.
Trecothick v. Austin, 16, 37.
Trenton Banking Co. v. Rossell, 116.
Trenton Pass. Ry. Co. v. Wilson, 371.
Trescot v. Smyth, 15.
Trevanian v. Mosse, 476.
Tribette v. Railroad Co., 256.
Triebert v. Burgess, 107, 239.

[The figures refer to pages.]

Trigg v. Hitz, 279.
Triplett v. Sayre, 239.
v. Wilson, 311.
Troup v. Haight, 307.
Trower v. Bernard, 421.
Troy Iron & Nail Factory v. Corning, 111.
Trulock v. Robey, 313.
Truly v. Lane, 113.
Trusdell v. Lehman, 259.
Trustees of Canandaigua Academy v. McKechnie, 239.
Trustees of Schools v. Wright, 397.
Trustees of Village of Watertown v. Cowen, 394, 395.
Trust & Fire Ins. Co. v. Jenkins, 84.
Tryon v. Improvement Com. Co., 378.
Tuck v. Manning, 108.
Tucker v. Holley, 230.
v. Insurance Co., 309.
v. Railroad Co., 505, 508.
v. Tucker, 59.
Tulk v. Moxhay, 126.
Tupper v. Powell, 233.
Turnage v. Fisk, 97.
Turnbull v. Crick, 288.
Turner v. Bank, 388, 389.
v. Berry, 153.
v. Hart, 53.
v. Knell, 134.
v. Robinson, 345.
v. Williams, 242.
Tyler v. Bell, 378.
v. Peatt, 268.
v. Savage, 223.
v. Tyler, 191.
v. Water Co., 51.
Tyson v. Applegate, 31.

U

Uhlmann v. Brewing Co., 215.
Underhill v. Allen, 262.
v. Insurance Co., 398.
Union Bank v. Barker, 512.
Union Bank of Georgetown v. Geary, 134, 136, 495, 496.
Union Bank of Louisiana v. Stafford, 27.
Union B. R. Co. v. East Tennessee & G. R. Co., 413.
Union Ins. Co. v. Van Rensselaer, 240.
Union Mut. Life Ins. Co. v. Kellogg, 109.
Union Pac. Ry. Co. v. Meier, 373.
Union Switch & Signal Co. v. Philadelphia & R. R. Co., 423.
U. S. v. American Bell Tel. Co., 413.
v. Clarke, 46.
v. Dalles Military Road Co., 428.
v. Des Moines Nav. & Ry. Co., 375
v. Ferguson, 499.
v. Howland, 8.
v. Loughrey, 71.
v. McLaughlin, 217, 219, 287.
v. Mosby, 157.
v. New Bedford Bridge, 159.
v. Parrott, 165.
v. Pratt Coal & Coke Co., 185.
v. Scott, 498.
v. Southern Pac. R. Co., 372.
v. Steffens, 122, 271.
v. Trans-Missouri Freight Ass'n, 498.
v. Wilson, 250, 251.
v. White, 230, 401.
U. S. Bank v. Schultz, 189, 190.
United States Ins. Co. v. Central Nat. Bank, 494.
Universal Life Ins. Co. v. Devore, 341
Upjohn v. Ewing, 51.
Usborne v. Baker, 405.
Utica Ins. Co. v. Lynch, 501, 506, 509, 511.

V

Vail's Ex'rs v. Central R. Co., 370, 371.
Valentine v. Teller, 162.
Van Alst v. Hunter, 116.
Vance Shoe Co. v. Haught, 226.
Van Cortlandt v. Beekman, 246, 507.
Vanderveer's Adm'r v. Holcomb, 146, 156.
Van Deventer v. Stiger, 85.
Van Dyke v. Davis, 135.
Van Dyne v. Vreeland, 399.
Van Hook v. Pendleton, 112, 114.
v. Walton, 267.
v. Whitlock, 365, 398, 414, 416, 465, 466, 493, 498.
Van Keuren v. McLaughlin, 17.
Van Meter v. Borden, 162.
Vann v. Hargett, 19, 43.

[The figures refer to pages.]

Van Reimsdyk v. Kane, 54, 137.
Van Vechten v. Terry, 33.
Van Wyck v. Norvell, 496.
Varick v. Attorney General, 343.
v. Briggs, 475.
v. Smith, 58.
Vary v. Shea, 499.
Vattier v. Hinde, 27, 43, 524.
Vaughan v. Fitzgerald, 285.
Veazie v. Williams, 291, 292.
Venner v. Railroad Co., 385.
Vermilyea v. Fulton Bank, 496.
Verplanck v. Insurance Co., 234, 235, 236, 379.
Verplank v. Caines, 371.
v. Insurance Co., 100, 102.
Vetterlein v. Barker, 33.
v. Barnes, 33.
Vieley v. Thompson, 365.
Vigel v. Hopp, 134.
Vigers v. Lord Audley, 294, 299.
Vincent v. Matthews, 153, 312.
v. Moore, 51.
v. Vincent, 494.
Virginia & A. Min. & Manuf'g Co. v. Hale & Co., 17.
Vliet v. Sherwood, 123.
Vogle v. Ripper, 502.
Volintine v. Fish, 20.
Voorhees v. Bonesteel, 184.
v. Reford, 275.
v. Voorhees, 499.
Vorhees v. De Myer, 31.
Vosburgh v. Huntington, 279.
Vose v. Philbrook, 43, 185.
Voshell v. Hynson, 107.
Vreeland v. Stone Co., 505.

W

Waddams v. Humphrey, 116.
Waddell v. Beach, 308.
Waffle v. Vanderheyden, 77.
Wagner v. Shank, 119.
Wagstaff v. Reade, 476.
Wainwright v. Waterman, 28.
Wake v. Parker, 47.
Wakeham v. Barker, 262.
Wakelin v. Walthal, 360.
Wakeman v. Dodd, 493.
v. Grover, 34.
Wakeman v. Kingsland, 281.
Walburn v. Ingilby, 196.
Walden v. Bodley, 100–102, 104, 226.
v. Skinner, 37.
Walker, Ex parte, 105.
v. Brooks, 31, 194, 385.
v. Converse, 222, 224.
v. Cottrell, 185.
v. Devereaux, 123, 223, 230.
v. Gilbert, 292.
v. Hallett, 235, 236.
v. Locke, 385.
v. Powers, 344, 378.
v. Ray, 190, 397.
v. Walker, 202.
Wall v. Fairley, 53.
v. Thomas, 39.
Wallace v. Sortor, 278, 279.
Waller v. Harris, 232.
v. Taylor, 344.
Wallis v. Duke of Portland, 140.
Wallworth v. Holt, 34, 44.
Wallwyn v. Lee, 475, 476.
Walmsley v. Child, 289.
Walpoe v. Orford, 225.
Walsh v. Preston, 22.
v. Varney, 51.
Walters v. Walters, 24.
Walton v. Cody, 498.
v. Westwood, 374.
Wangelin v. Goe, 378, 388.
Ward v. Arredondo, 42.
v. Cooke, 339, 347.
v. Duke of Northumberland, 24, 338, 345.
v. Hill, 114.
v. Patton, 104.
Warder v. Arell, 391.
Ware v. Curry, 340.
v. Thompson's Adm'rs, 233.
Warfield v. Gambrill, 246.
Waring v. Mackreth, 400, 478.
v. Suydam, 402.
v. Turton, 32.
Warner v. Conant, 119.
v. Dove, 518.
Warren v. Warren, 339, 505.
Warren Mills v. New Orleans Seed Co., 256.
Wartnaby v. Wartnaby, 457.
Washington R. R. v. Bradleys, 100, 305.

[The figures refer to pages.]

Wasson v. Gould, 135.
Waterman v. Curtis, 243.
Waters v. Earl of Shaftesbury, 140.
v. Perkins, 361.
Watkins v. Arms, 266.
v. Land Co., 494.
v. Stone, 417.
Watson v. Brewing Co., 14.
v. Byrd, 398.
v. Holliday, 252.
v. Hunter, 120.
v. Jones, 88, 461.
Watt v. Starke, 115.
Watts v. Lawrence, 126.
v. Starke, 116.
v. White, 71.
Way v. Bragaw, 342, 461.
Weatherhead v. Blackburn, 369.
Weathers v. Hill, 259.
Weaver v. Bates, 252.
Webb v. Fuller, 466.
v. Insurance Co., 524.
v. Pell, 137, 312, 313, 484.
v. Railroad Co., 30.
Webber v. Gage, 194.
Webster v. French, 20, 25.
v. Harris, 169, 221, 224.
v. Hitchcock, 302.
v. Threlfall, 78.
v. Webster, 442.
Wedderburn v. Wedderburn, 462.
Weed v. Smull, 305, 473.
Weightman v. Powell, 84.
Weisman v. Mining Co., 192.
Welch v. Louis, 299.
v. Walker, 71.
Welles v. Rhodes, 253.
Wellesley v. Wellesley, 295, 366, 378.
Wellington v. Heermans, 185.
Wells v. Cruger, 85.
v. Houston, 135, 520, 522.
v. Query, 499.
Welsh v. Baynud, 224, 225.
Wendell v. Van Rensselaer, 25, 41.
Wendell's Ex'rs v. Van Rensselaer, 44.
Werner v. Rawson, 258.
Wescott v. Wicks, 225.
Wesling v. Schrass, 434.
West v. Bank, 50.
v. Krebaum, 240.
v. Randall, 14, 16, 19, 25, 34, 38, 41–44, 330.
West v. Reynolds, 188.
v. Smith, 70, 72.
v. Swan, 107.
Westcomb v. Westcomb, 54.
Westcott v. Cady, 302.
Western R. Co. v. Nolan, 34.
Westhead v. Keene, 272.
Weston v. Assurance Corp., 189.
v. Blake, 394.
v. Keighley, 57.
Wetherell v. Eberle, 252.
Whaley v. Dawson, 339, 347.
Wharton v. Lowrey, 100.
Wheat v. Moss, 136.
Wheeler v. McCormick, 430.
v. Trotter, 191.
v. Wilkins, 70.
Wheeler & W. Manuf'g Co. v. Filer, 235.
Whipperman v. Dunn, 259.
Whipple v. Village of Fair Haven, 221.
Whitbeck v. Edgar, 305, 394.
Whitbread v. Brockhurst, 399, 416.
Whitby v. Rowell, 239.
Whitchurch v. Bevis, 438, 467, 468.
White v. Bank of U. S., 471.
v. Bridge Co., 499.
v. Buloid, 307, 406.
v. Curtis, 340.
v. Davis, 236.
v. Dummer, 379.
v. Jeffers, 185, 225.
v. Lewis, 84.
v. Malcolm, 156.
v. Morrison, 524.
v. White, 339, 499.
v. Williams, 509.
v. Yaw, 171, 222.
Whitecar v. Michenor, 118.
Whitehead v. Entwhistle, 114.
v. Kitson, 122.
v. Shattuck, 9.
Whitfield v. Fausset, 289.
Whiting v. Bank, 152, 311, 316, 406.
v. Rush, 355.
Whitlock v. Fiske, 434.
Whitmarsh v. Campbell, 103.
Whitney v. City of New Haven, 197.
v. McKinney, 37.
v. Mayo, 20, 26, 35, 44.
Whittelsey v. Beall, 239, 240.
Whitten v. Whitten, 247, 330.

[The figures refer to pages.]

Whittingham v. Burgoyne, 368.
Wichalse v. Short, 472.
Wick v. Dawson, 213.
Wickliffe v. Owings, 493.
Wiegert v. Franck, 130.
Wiggin v. Mayor, 194.
Wilbridge v. Case, 245.
Wilbur v. Collier, 275.
Wilcox v. Pratt, 26.
Wilder v. McCormick, 272.
Wiles v. Trustees, etc., 391.
Wilhelm's Appeal, 398.
Wilkes v. Rogers, 189.
Wilkin v. Wilkin, 145, 224.
Wilkins v. May, 137.
Wilkinson v. Bauerle, 135, 499.
v. Dobbie, 229, 334.
v. Parish, 315.
Wilkson v. Blackwell, 340.
Willard v. Willard, 244.
Willett v. Woodhams, 222, 234.
Wm. Rogers Manuf'g Co. v. Rogers, 120, 261.
Williams v. Bankhead, 14, 22, 36, 38, 39.
v. Cooke, 299.
v. Corwin, 80, 83.
v. Douglas, 349.
v. Hubbard, 265, 370.
v. Langevin, 262.
v. Matthews, 278.
v. Morgan, 33.
v. Neel, 347.
v. Owen, 360.
v. Rhodes, 493.
v. Soutter, 240.
v. Thompson, 85.
v. U. S., 22, 190.
v. Walker, 281.
v. Whinyates, 28.
v. Williams, 28.
v. Wright, 281.
Williamson v. Sykes, 85.
Willis v. Corlies, 106.
v. Evans, 352.
v. Henderson, 20, 25, 26.
Wilmarth v. Woodcock, 200, 370.
Wilmington Star Min. Co. v. Allen, 190, 234.
Wilson v. Barnum, 115.
v. Cheshire, 265.
v. Church, 17.
Wilson v. Eggleston, 190, 191, 370.
v. Forster, 404.
v. Hill, 121.
v. Horr, 225.
v. Lineberger, 231.
v. Webber, 514.
v. Wilson, 47, 253, 312.
Wilson's Ex'rs v. Cobb's Ex'rs, 134.
Winchester v. Winchester, 155.
Windsor v. Windsor, 237.
Winebrenner v. Colder, 191.
Wing v. Davis, 50.
v. Goodman, 305, 360.
v. Spaulding, 278-281.
Wingfield v. Whaley, 30.
Wingo v. Hardy, 187, 520.
Winkler v. Winkler, 388, 499.
Winn v. Albert, 137.
Winnipiseogee Lake Co. v. Young, 186, 195.
Winnipissiogee Lake Co. v. Worster, 184, 186.
Winslow v. Dousman, 59.
v. Nayson, 221, 224.
v. Railroad Co., 33.
v. Winslow, 309.
Winsor v. Bailey, 341.
Winston v. Westfeldt, 122.
Winter v. Rose, 76.
Winters v. Claitor, 360.
Winthrop Iron Co. v. Meeker, 149.
Wiscart v. Dauchy, 155.
Wise v. Railroad Co., 271.
Wiser v. Blachly, 19, 311, 313, 314, 316.
Wiswall v. Wandell, 511.
Wiswell v. Congregational Church, 122.
Witters v. Sowles, 111.
Wolf v. McGugin, 265.
v. Wolf's Ex'r, 140, 512, 513.
Wolverton v. George H. Taylor & Co., 48.
Wood v. Beadell, 223, 230, 234.
v. Dummer, 25, 34, 41, 44.
v. Hudson, 288.
v. Johnson, 21.
v. Mann, 314, 349, 476, 508, 516.
v. Midgley, 329.
v. Riker's Ex'rs, 466.
v. Swift, 120.
v. Taylor, 354.
v. Truax, 292.
v. Williams, 30.

[The figures refer to pages.]

Woodcock v. Bennet, 214.
Woodruff v. Young, 58.
Woodruff's Ex'rs v. Brugh, 293.
Woods v. Evans, 260.
v. Morrell, 348, 349, 505, 507, 509, 510.
Woolensak v. Relher, 272.
Woolsey v. Judd, 121.
Wooster v. Blake, 430.
Wooten v. Pope, 246.
Wootten v. Burch, 197, 224.
Word v. Word, 106.
Wormley v. Wormley, 37, 394, 494.
Worthington v. Lee, 355.
v. Scribner, 403.
Worthy v. Brady, 266.
v. Johnson, 347.
Wright v. Atkyns, 222.
v. Dame, 171, 187, 188, 202, 209, 373, 385.
v. Dorset, 298.
v. Frank, 307.
v. Miller, 306.
v. Plumptre, 333, 393.
v. Wilkin, 229.
v. Wright, 236, 378.
Wyatt v. Greer, 223.
v. Magee, 159.
Wych v. Meal, 16, 17, 54.
Wyckoff v. Sniffen, 494.
Wynne v. Callander, 347.
Wythe v. Palmer, 415.

Y

Yarborough v. Thompson, 278.
Yates v. Hambly, 27.
v. Hardy, 97.
v. Monroe, 289.
Yeaton v. Lenox, 343.
York v. Rockwood, 266, 268, 269.
Young v. Bilderback, 378.
v. Cushing, 22.
v. Frier, 275.
v. Grundy, 218, 518.
v. Hopkins, 136.
v. Keighly, 314.
v. Kelly, 298.
v. McKee, 517.
v. Manufacturing Co., 496.
v. Smith, 147.
v. White, 431.
v. Young, 59, 263.
Youngblood v. Sexton, 51.
Yount v. Turnpaugh, 54.

Z

Zabel v. Harshman, 52.
Zebley v. Trust Co., 397.
Zeigler v. Hughes, 493.
Zelle v. Banking Co., 20.
Ziegler v. Grim, 246.

INDEX.

[THE FIGURES REFER TO PAGES.]

A

ABATEMENT,
see "Bills of Revivor."

ACCIDENT,
as ground for reforming instrument, 253.
see "Bills to Reform Instruments."

ACCOUNTS, STATED AND SETTLED,
see, also, "Matters in Pais"; "Pleas in Bar."
defined, 473.
when pleaded in bar, 473.

"ADDRESS, OR DIRECTION,"
see "Bill in Equity."
formal part of bill, 183.
must be addressed to proper court, 183.
amendable, if defective, 183.

ADEQUATE REMEDY AT LAW,
See "Answer"; "Bill in Equity"; "Certainty"; "Demurrer."
want of, when ground for demurrer, 387.

ADMISSIONS,
see, also, "Evidence."
nature and effect of, 130.
how classified, 130.
constructive admissions, 130.
defined, 130.
by demurrer, 374, 375.
by plea, 422.
properly, none by answer, 130.
rule not settled, 130.
actual, or express admissions, 130.
by agreement of parties, 130.
stipulations to be in writing, 130.

[The figures refer to pages.]

ADVERSE CLAIMS,
see "Bills to Quiet Title."
may be removed by equitable suit, 249.

"ALLEGATA ET PROBATA,"
see, also, "Sufficiency."
rule governing decision of court, 319, 320.

ALTERNATIVE PLEADING,
see, also, "Consistency and Directness."
not allowed, 336.

AMBIGUITY,
see "Consistency and Directness."
in pleading, 335.

AMENDMENT,
see, also, "Supplemental Bills."
discretionary with court, 99.
when allowed, 99.
formal defects, 100.
amendment as of cause, 101.
when leave of court necessary, 102, 103.
strict rule as to pleas or answers under oath, 102.
on what grounds allowed, 102, 103.
not generally proper after issue joined, 103.
cannot present new case or defense, 104.
not for matters arising since filing of original bill or answer, 104.

ANOMALOUS PLEAS,
see, also, "Plea."
defined, 430.
when available, 436.
when the proper method, 436, 437.

"ANOTHER SUIT PENDING,"
see "Demurrer"; "Plea."
at common law, no defense in equity, 462.
but equity will compel election, 462.
analogous to common-law defense, 461.
when available by plea, 461.
when ground of demurrer, 399.
conflicting suits in state courts, 88.
conflicting suits in federal courts, 88.

ANSWER,
see "Answer and Disclaimer"; "Answers in Support of Pleas"; "Responsiveness"; "Sufficiency."

[The figures refer to pages.]

ANSWER—Continued,
in general, 486.
nature and object of, 95, 486.
final method of defense, 486.
most defenses now presented by, 486.
necessity for answer, 486.
form of answer, 487, 488.
title, 488.
reservation, 488.
object of, 488, 489.
not used for infant, 489.
body, or substance, 489.
of what it consists, 489.
conclusion, 489.
general traverse, 489.
prayer, 490.
nature and office, 490.
definition, 490.
dual character of, 490.
what it may present, in general, 490.
in early procedure, 491.
term "answer," how applied, 492.
when used concurrently with other methods, 492.
when overrules demurrer or plea, 492.
see, also, "Demurrer"; "Plea."
may present same defense after demurrer or plea overruled, 493.
most defenses presentable by, 493.
limitation as to concurrent pleadings, 494.
signature, when required, 495.
see, also, "Signature of Counsel."
oath, or verification, 495.
see "Oath."
not required to corporate answer, 495.
effect of waiver, 496.
substance and effect, in general, 497.
effective in two ways, 497.
rule as to substantial requirements, 497.
admitting allegations of bill—hearing on bill and answer, 498.
admitting and avoiding allegations of bill, 499.
available for defense only, 499.
affirmative relief not obtained by, 499.
certainty in, 500.
see, also, "Certainty."

[The figures refer to pages.]

ANSWER—Continued,
sufficiency of, in general, 504, 505.
see, also, "Sufficiency."
responsiveness, 519, 522.
exceptions to answer, 96.
see "Exceptions."

ANSWERS IN SUBSIDIUM,
defined, 448.
distinguished from answers in support of pleas, 448.
support of plea as pleading instead of by discovery, 448.
general purpose of, 449.

ANSWERS IN SUPPORT OF PLEAS,
see "Answer"; "Discovery"; "Plea."
when required, in general, 438.
principles governing use, 439.
essential object of, 439.
when plea not exclusive, 439, 440.
discovery must be specially called for by bill, 440.
former practice as to, 440.
modern rule, 440, 441.
if no interrogatories, no answer necessary, 441.
nor when plea sets up good bar, admitting all in opposition, 442.
waiver of answer under oath, 442.
where fraud and combination charged, 442.
anomalous pleas, when, 445.
the rule explained, 445, 446.
past and present rules, 448.

APPEALS,
see "Decrees."
appeal defined, 154.
nature and effect, 154.
analogous to writ of error at law, 155.
removes entire cause to appellate court, 155.
in general, only from final decrees, 155.
interlocutory decrees appealable only by statute, 155.
rules as to, not uniform, 155.
under "Evarts Act," 155.
consent decrees not generally appealable, 155.
nor discretionary orders, 156.
discretion does not necessarily exclude appeal, 156.
who can take, 156.
cross appeals, 156.

[The figures refer to pages.]

APPEALS—Continued,
no appeal, generally, from decree in party's own favor, 156.
modes of taking, 157.
security, when required, 157.
must be taken within time allowed, 157.
statutory period absolute, 157.
procedure in federal courts, 157.
limited by amount in controversy—the test, 157.
effect of appeal, 157.
questions before appellate court, 157.
objections not considered unless interposed below, 157.
rule as to "error without prejudice" applied, 157.
matters brought up by appeal, 157.
consideration generally limited to objections presented, 157.

APPEARANCE,
see "Process for Appearance."
defined, 74,
voluntary or involuntary, 74.
how made, in general, 74, 75.
time for appearance, 75.
in federal courts, 75.
how entered of record, 76.
general appearance, 76.
defined, 76.
effect of, 76.
special appearance, 76.
defined, 76.
effect of, 77.
right to appear specially, how lost, 77.
appearance gratis, 77.
object and effect of, 77.

ARGUMENTATIVENESS,
see, also, "Consistency and Directness."
objectionable in pleading, 336.

ASSISTANCE,
see "Enforcement of Decrees"; "Writ of Assistance."

AWARD,
see, also, "Pleas in Bar."
when a defense in equity, 474.
how presented, 474.
agreement for submission not averred, 474.

[The figures refer to pages.]

B

BILL IN EQUITY,
See "Amendment"; "Bills for Infringement of Patents"; "Bills for Specific Performance"; "Bills of Review"; "Bills of Revivor"; "Bills to Enforce Decrees"; "Bills to Foreclose Mortgages"; "Bills to Impeach Decrees"; "Bills to Quiet Title"; "Bills to Set Aside Fraudulent Conveyances"; "Bills to Suspend or Avoid Decrees"; "Certainty"; "Consistency and Directness"; "Creditors' Bills"; "Impertinence"; "Multifariousness"; "Scandal"; "Sufficiency"; "Supplemental Bills"; "Taking Bill Pro Confesso."
definition and nature, 168.
performs twofold office, 168, 170.
first pleading in suit, 168.
origin of "bill in chancery," 169.
generally, a petition for relief, 169.
strictly, a statement of facts showing case for equitable relief and prayer for process, 170.
double function of bill, 170.
as a pleading, 170.
as an examination of defendant, 171.
must pray for process and for relief, 171.
classification of bills, 171.
original bills defined, 171.
general object of, 172.
how divided, 172.
bills praying relief, 172.
bills not praying relief, 172.
original bills praying relief, 173.
pleas to, 449.
original bills not praying relief, 283.
demurrers to, 404.
pleas to, 479.
defined, 283.
classification of, 283.
what are, 173, 174.
how classified, 173.
analysis of bill, 174.
separate parts of bill, 174, 175.
bill formerly simple in form, 175.
growth of the formal method, 176.
relation of different parts explained, 177.
ancient form of original bill, 177, 180.

[The figures refer to pages.]

BILL IN EQUITY—Continued,
modern form of bill in federal court, 180–182.
address or direction, 183.
see "Address or Direction."
purely formal part of bill, 183.
nature and requisites of, 183.
introduction, 183.
see "Introduction."
nature and office, 183.
premises, or stating part, 186.
nature and office of, 186, 187.
statement of cause of action, 187.
scandalous matter in, 348.
see, also, "Scandal."
impertinent matter in, 349.
see, also, "Impertinence."
confederating part, 204.
see "Confederating Part."
form and object of, 204.
charging part, 205.
see "Charging Part."
nature and object of, 205.
jurisdiction, averment of, 211.
interrogating part, 212.
see "Interrogating Part."
nature and office of, 212–218.
prayer for relief, 220.
an essential part of bill, 221.
scope and object of, 221–233.
prayer for process, 233.
general form and object of, 233, 235.

BILL OF COMPLAINT,
See "Bill in Equity"; "Certainty"; "Consistency and Directness"; "Multifariousness"; "Sufficiency."
nature and office of, 63.
historical development of, 63.

BILL OF INTERPLEADER,
see "Bill in Equity."
defined and explained, 277.
when an available remedy, 278.
equitable grounds to support, 278.
property claimed by two parties and held by third, 278.

[The figures refer to pages.]

BILL OF INTERPLEADER—Continued,
claimants must have separate interests, 278.
complainant must be indifferent between them, 279.
proceeding must decide rights of all with reference to property in question, 279.
equivalent method under codes, 279.
the statement of facts, 280.
requisites of, 280.
rights or claims of all parties to be fully set forth, 280.
greater certainty in stating nature of conflicting claims, 280.
must show privity between claimants, 280.
lessee vs. lessor and assignee, 280.
at least two claimants to property in question, 278.
complainant must show himself as mere stakeholder, 281.
possession of tangible property essential, 281.
prayer, 281.
specific, to what extent, 281.
injunction, when prayed, 281.
bill should offer to bring money into court, 281.
affidavit required to show absence of collusion, 281.
bill by officer of corporation, 282.
bills in nature of interpleader, 282.
by party to establish his equitable rights as against third parties also interested, 282.
distinguished from bill of interpleader, 282.

BILLS FOR INFRINGEMENT OF PATENTS,
see "Bill in Equity"; "Certainty"; "Consistency and Directness"; "Impertinence"; "Multifariousness"; "Scandal"; "Sufficiency."
when an available remedy, 269.
general objects, 269.
grounds of equity jurisdiction, 270.
common-law method only sufficient as to damages, 270.
injunction necessary for full protection of patentee, 270.
proceeding strictly a bill for an injunction, 270.
jurisdiction exclusive in federal courts, 271.
the statement of facts, 271.
must be accurate and complete, 271.
certainty required, 271.
facts of ownership and description, 271.
identity an important question, 271.
execution and delivery of patent, 271.
profert, when necessary, 271.
exclusive use and possession of patent for statutory period, 272.

[The figures refer to pages.]

BILLS FOR INFRINGEMENT OF PATENTS—Continued,
facts showing title, as to assignments, etc., 272.
present state of title must be clearly shown, 272.
facts of infringement to be stated, 272.
and whether complainant's right has been established at law, 272
or whether injunction issued in support of same, 272.
prayer, 272.
specific and general, 272.
should ask discovery, answer, and decree, 272.
accounting and payment of gains and profits, 272.
BILLS FOR PARTITION,
see "Bill in Equity"; "Certainty"; "Consistency and Directness"; "Impertinence"; "Multifariousness"; "Scandal"; "Sufficiency."
nature and object of, 244.
available for all having interests in common in real estate, 244.
remedy formerly by writ of partition at common law, in favor of coparceners only, 244.
when a partition may be made, 244.
generally regulated by statute, 245.
legal title to land must be undisputed, 245.
if complainant not in actual or constructive possession, ejectment the remedy, 245.
facts to be stated, 245.
statutory requirements to be strictly followed, 245.
complainant's title or interest, 246.
actual or constructive possession, 247.
description and value of land, 247.
value of relative proportions of persons interested, 247.
certainty generally required, 247.
allegations of ownership, 247.
possession, when implied, 248.
strictly, no statement of injury, 248.
except on failure to partition amicably, 248.
or where continuance in common would work injury, 248.
generally a matter of right, 248.
prayer, 248.
should be framed according to bill, 248.
when in alternative, 248.
should ask partition and general relief, 248.
actual partition not ordered on bill praying only a sale, 248.
BILLS FOR SPECIFIC PERFORMANCE,
see "Bill in Equity"; "Certainty"; "Consistency and Directness"; "Impertinence"; "Multifariousness"; "Scandal"; "Sufficiency."

[The figures refer to pages.]

BILLS FOR SPECIFIC PERFORMANCE—Continued,
nature and office of, 159, 260.
when an available remedy, 260.
must be proper case for interference of equity, 260.
legal contract, capable of specific enforcement, 261.
for delivery of personal property of special character, 261.
or of particular real estate, 261.
contracts not enforceable, 261.
contract partly performed, 261.
facts to be stated, 261.
legal and proper contract must be clearly shown, 261.
property affected to be fully described, 262.
facts of a title claimed to be defective must be shown, 262.
performance by complainant of conditions precedent, 262.
or averment of readiness and offer to perform, 262.
part performance or offer to state facts, 262.
when general allegation of performance sufficient, 262, 263.
refusal or neglect of defendant resulting in injury, 263.
unless defendant wholly denies contract, or otherwise useless, demand of performance shall be alleged, 263.
want of adequate remedy at law, 263.
absence of laches or an excuse for delay, 263, 264.
prayer, 264.
according to object of bill, 264.
both special and general, 264.

BILLS IN NATURE OF ORIGINAL BILLS,
defined and classified, 303.
not interlocutory, though not wholly original, 303.
demurrers to, 405.
see "Bill in Equity"; "Bills of Review"; "Bills to Carry Decrees into Execution"; "Bills to Impeach Decrees"; "Bills to Suspend or Avoid Decrees"; "Cross Bills."

BILLS NOT ORIGINAL,
defined and classified, 289.
demurrers to, 405.

BILLS OF CERTIORARI,
nature and object of, 282.
requisites as a pleading, 282.
object of, 283.
a remedy seldom used, 283.

BILLS OF DISCOVERY,
defined, 287.
originally an important remedy, 287.

[The figures refer to pages.]

BILLS OF DISCOVERY—Continued,
not generally available at present time, 287.
how far permitted in state courts, 287.
rule not settled in federal courts, 288.
the statement of facts, 288.
must be sufficient for object contemplated, 288.
title or interest in obtaining discovery, 289.
case must be stated sufficient for claim or defense at law, 289.
privity must be shown, if foundation of interest, 289.
object of discovery to be stated, 289.
both relief and discovery may be prayed, 289.
BILLS OF PEACE,
defined, 254.
nature and office of, 254.
community of interest in subject-matter generally necessary, 254.
proceeding sustained to avoid multiplicity of suits, 254.
settlement of questions between a landlord and numerous tenants, 255.
claimant of fishing right and riparian owners, 255.
numerous claimants of easement and person obstructing same, 255.
rights of mill owners in common reservoir, 255.
must be common right or interest in property against opposing claim, 255.
or specific facts warranting equitable interference, 256.
common interest in result not sufficient, 256.
BILLS OF REVIEW,
see "Bill in Equity"; "Decrees."
defined and explained, 153, 307, 310.
object, in general, 310.
theory of the bill, 311.
when an available remedy, 153, 311.
in general, must be filed before decision on appeal, 311.
the New Jersey rule, 311.
decree to be reviewed must be final one, 311.
and not entered by consent, 153, 312.
except for fraud or mistake, 153.
bill filed in court rendering decree, 312.
when filed upon leave of court, 312.
new and independent, but not original, proceeding, 153.
in nature of writ of error at common law, 312.
two general grounds for support of bill, 153.
errors in law, 312.
must appear on face of decree, 312.
what constitutes, in general, 312.

[The figures refer to pages.]

BILLS OF REVIEW—Continued,
more than errors of form, or questions as to propriety of decree, 313.
contemplates examination of all proceedings resulting in decree, 313.
new matter, 313.
rule same as to newly-discovered evidence at law, 313.
conditions requisite, 313.
matter must be relevant, not merely cumulative, and capable of effecting different result, 313.
must have been first known too late for original hearing, and not to be discovered by due diligence, 314.
test of materiality, 314.
filing, for new matter, not of right, but on leave of court, 314.
general nature of bill, 314, 315.
the statement of facts, 315.
general requisites, 315.
leave of court to be alleged, when necessary, 315.
facts of newly-discovered evidence, 315.
leave to file bill dependent upon relevancy of new facts, 315.
prayer, 315.
general form of, 315.
if original decree executed, should ask further decree restoring status of party, 315.
demurrer to, 406.
pleas to, when proper, 484.
grounds of, 484.
defenses to bill for errors apparent, 484.
defenses to bill for new matter, 484.
plea after leave of court, 484.
supplemental bill in nature of review—plea to, when, 484.
bills in the nature of bills of review, 316.
distinguished from bills of review, 316.
brought to review decree not enrolled, 316.

BILLS OF REVIVOR,
see "Bill in Equity"; "Prayer for Relief."
defined and explained, 297.
when an available remedy, 298.
causes of "abatement," in equity, 298.
by whom bill maintained, 298.
ordinarily, in case of death of original party, only by representative of, or one in privity with, deceased, 299.
more simple remedy adopted, 299.
concurrent with remedy in chancery, 299.
the statement of facts, 299.

[The figures refer to pages.]

BILLS OF REVIVOR—Continued,
requisites under present practice, 299.
must be sufficient to justify and explain prayer, 299.
and to show complainant's title, etc., 299.
prayer, 300.
framed according to particular case, 300.
when it should ask answer by representatives substituted, 300.
when demurrable, 405.
original bills in the nature of bills of revivor, 300.
distinguished from preceding, 300.
proper when facts of transmission of interest of deceased party are disputed, 300.
dependent upon privity in estate or title by act of parties, 300.
the statement of facts, 301.
generally same as in bill of revivor, 301.
prayer, 301.
what it must contain, 301.
demurrer to, 405.
pleas to, 483.
grounds of defense, 483.

BILLS OF REVIVOR AND SUPPLEMENT,
defined and explained, 301.
when available, 302.
object of proceeding, 302.
original bills in the nature of revivor and supplement, 302.
nature and object of, 302.

BILLS TO EFFECTUATE OR CARRY OUT DECREES,
see "Bill in Equity."
nature and object of, 164, 318.
when an available remedy, 318.
by whom brought, 318.
restrictions upon relief granted, 318.
form and structure dependent upon object contemplated, 319.
when demurrable, 407.
pleas to, when proper, 485.

BILLS TO EXAMINE WITNESSES DE BENE ESSE,
defined and explained, 286.
now generally superseded by statutory methods, 286.
distinguished from bill to perpetuate testimony, 286.
can only be used in aid of pending suit, 286.
object, to preserve testimony for present litigation, 286.

[The figures refer to pages.]

BILLS TO EXAMINE WITNESSES DE BENE ESSE—Continued,
general requirements, 286.
accompanied by supporting affidavit, when, 286.

BILLS TO FORECLOSE MORTGAGES,
see "Bill in Equity"; "Certainty"; "Consistency and Directness"; "Impertinence"; "Multifariousness"; "Scandal"; "Sufficiency."
in general, 237.
methods of foreclosure now adopted, 238.
principles of pleading generally the same in all, 238.
the statement of facts, 239.
must show complainant's title and interest, 239.
execution and delivery of note and mortgage, 239.
description of both, and of property, 239.
default in payment, 239.
amount due complainant, 239.
that no proceedings, or what, if any, for recovery of debt, 239.
ownership of security, 240.
degree of certainty required, 240.
statutory requirements to be followed, 241.
when bill demurrable, 241.
prayer, 241.
framed according to particular method adopted, 241.

BILLS TO IMPEACH DECREES FOR FRAUD,
see, also, "Bill in Equity"; "Fraud."
nature and object of bill, 154, 316.
when an available remedy, 154, 316.
method of procedure, 316.
existence of fraud principal fact in issue, 317.
and proof a condition precedent, 317.
filed without leave of court, 317.
the statement of facts, 317.
general requisites of, 317.
must clearly show fraud, 317.
prayer according to object of bill and facts stated, 317.
requisites of bill as pleading, 154.
when demurrable, 407.
pleas to, 472, 485.

BILLS TO PERPETUATE TESTIMONY,
see "Bill in Equity."
defined and explained, 283.
generally superseded by other methods, 284.
when available as a remedy, 284.

[The figures refer to pages.]

BILLS TO PERPETUATE TESTIMONY—Continued,
when bill cannot be maintained, 284.
the statement of facts, 284.
subject-matter to be established by proposed evidence, 284.
interest of complainant endangered by nonpreservation of testimony, 285.
title or interest of defendant, 285.
necessity for perpetuating evidence, 285.
allegations should show right to be supported, 285.
and that facts cannot be immediately investigated at law, 285.
prayer, 285.
strictly, seeks no relief, 285.
must ask leave to examine witnesses for object contemplated, 285.
bill may be dismissed if equitable relief is prayed, 285.

BILLS TO QUIET TITLE,
see "Bill in Equity"; "Certainty"; "Consistency and Directness"; "Impertinence"; "Multifariousness"; "Scandal"; "Sufficiency."
defined, 248.
nature of proceeding, 249.
strictly a bill of peace, 250.
now generally regulated by statute, 250.
facts to be stated, 250.
generally indicated by the statute, 250.
ownership of complainant essential, 250.
actual or constructive possession, 251.
clear description of property affected, 251.
actual possession by complainant generally necessary, 251.
unless title merely equitable, 252.
hostile claim of defendant must be shown, 253.
also statement of facts showing real or threatened injury, 253.
equitable title may be generally stated, 253.
prayer, both special and general, 254.

BILLS TO REDEEM,
see "Bill in Equity"; "Certainty"; "Consistency and Directness"; "Impertinence"; "Multifariousness"; "Scandal"; "Sufficiency."
defined and explained, 241.
procedure generally regulated by statute, 242.
the facts to be stated, 242.
general principles of equity pleading applicable, 242.
title or interest of complainant, 242.
see "Title or Interest."
right of redemption and its origin, 242.

[The figures refer to pages.]

BILLS TO REDEEM—Continued,
generally, a tender and refusal, or an offer to pay amount due, 242.
absence of laches or unreasonable delay, 243.
fraud and usury, how pleaded, 243.
certainty required, in general, 243.
prayer, 243.
should generally seek accounting, 243.
may also contain offer to pay, 244.
general and special, 243.

BILLS TO REFORM INSTRUMENTS,
see "Bill in Equity"; "Certainty"; "Consistency and Directness"; "Impertinence"; "Multifariousness"; "Scandal"; "Sufficiency."
defined and explained, 256.
reformation a subject of equity jurisdiction, 257.
relief afforded generally only for fraud, accident, or mistake, 257.
grounds for reformation must be clearly established, 257.
facts to be stated, 258.
instrument and real agreement entered into, 258.
error and in what manner it arose, 258.
certainty required, 258.
allegation or showing of fraud, accident, or mistake, 258.
mutuality to be shown in mistake in original agreement, 258.
not for error in reducing same to writing, 258.
request for correction of mistake unnecessary where fraud or bad faith shown, 259.
statement must show complainant's equity, 259.
also diligence in filing bill, 259.
and more than misunderstanding of terms or agreement, 259.
prayer, 259.
should indicate particular relief desired, 259.
also general prayer, 259.

BILLS TO SET ASIDE FRAUDULENT CONVEYANCES,
see "Bill in Equity"; "Certainty"; "Consistency and Directness"; "Impertinence"; "Multifariousness"; "Scandal"; "Sufficiency."
nature and object of, 264.
growth and extent of equity jurisdiction, 265.
what, in general, termed fraudulent conveyances, 266.
fraudulent intent the essential element, 266.
must exist in both debtor and grantee, 266.
exception, voluntary conveyance, without consideration, 266.
intent, when inferred from circumstances, 266.
facts to be stated, 267.

[The figures refer to pages.]

BILLS TO SET ASIDE FRAUDULENT CONVEYANCES—Continued,
framed according to circumstances, 267.
general requisites, 267.
existence of creditors, and contracting debt with fraudulent intent, 267.
transfer of property from which debts could have been paid, 267.
insolvency of debtor, 268.
actual fraud alone may be a sufficient ground, 268.
certainty required, in general, 268.
intent, how shown, 268.
an essential element, when, 266.
how alleged in pleading, 268.
complainants' demand must be due, 267.
fraud shown either by formal allegations or by facts, 269.
notice to fraudulent grantee, when to be charged, 269.
prayer, 269.
special request for particular relief desired, 269.
account of rents and profits, 269.

BILLS TO SUSPEND OR AVOID OPERATION OF DECREES,
see "Bill in Equity."
nature of, 317.
method of procedure, 317.
not in present use, 317.
when demurrable, 407.

BILLS WITH DOUBLE ASPECT,
see, also, "Consistency and Directness."
what are, 334.
in what cases allowed, 334.
instances of the method, 334, 335.

BONA FIDE PURCHASER,
see, also, "Answer"; "Demurrer"; Plea."
nature of defense in equity, 404.
when ground of demurrer to discovery, 404.
when defense by plea, 474.
how pleaded under equity rules, 516.

BREACH OF PROFESSIONAL CONFIDENCE,
see "Answer"; "Demurrer"; "Demurrer to Interrogatories"; "Plea."
rule of public policy, 140.
what communications privileged, 140, 141.
when a defense in equity, 140, 403, 479, 511.
by demurrer, 403.

[The figures refer to pages.]

BREACH OF PROFESSIONAL CONFIDENCE—Continued,
by demurrer to interrogatories, 140.
by plea, 479.
by answer, 511.

C

CAUSE OF ACTION,
see "Bill in Equity"; "Stating Part or Premises."
division of, not permitted, 322.
insufficient statement of, when ground for demurrer, 397.

CERTAINTY,
see "Answer"; "Bill in Equity."
general rules as to, 319.
more liberal than at law, 323.
their object to properly inform defendant, 323.
degrees of, at common law, 324.
to common intent only required in equity, 324.
causes of uncertainty, 324.
vague and uncertain statement, 324.
loose and improper statement of sufficient facts, 324.
connected facts, part properly stated, destroyed by improper statement of rest, 325.
in stating title or interest, 325, 326.
see, also, "Title or Interest."
facts as to, must generally be stated, 325.
time, how alleged, 327.
when material, must be correctly stated, 327.
what method generally sufficient, 327.
place, 327.
not common-law venue, 327.
when jurisdictional, to be alleged, 327.
matters in knowledge of defendant, 328.
rule of common law applicable, 328.
less certainty required than when known to complainant, 328.
facts may be stated upon information and belief, 328.
averment must still be positive, 328.
general statements, when allowed, 328.
minute circumstances establishing single precise fact, 328.
prolixity and confusion to be avoided, 328, 329.
acts or matters regulated by statute, 329.
common-law rule applicable, 329.
same certainty of allegation as before statute, 329.
contract by parol valid at common law, 329.

[The figures refer to pages.]

CERTAINTY—Continued,
but bill must not show that statute applies, 330.
acts created by statute, regulated by same, 330.
description of property, 330.
sufficient for identification, 330.
and to properly inform court and defendant, 330.
more accurate as to land than personal property, 330.
matters necessarily implied, 330.
facts implied as direct and necessary consequence of others need not be stated, 330.
conveyance by deed, delivery presumed, 330.
when payment of consideration implied, 330.
implication must be more than mere inference or conjecture, 331.
presumptions, 331.
legality of acts and motives, 331.
capacity to contract, 331.
validity of corporate acts, 331.
of law, not conclusive, 332.
distinguished from presumptions of fact, 332.
effect of, 331.
consequences of uncertainty, 332.
bill demurrable, if defect apparent, 332.
see, also, "Demurrer."
unless great variety of facts stated, warranting some relief, 332.
when cured by explanatory allegation, 332.
when by motion to make bill more certain, 332.
in answer, 500.
see, also, "Answer."
in general, 500.
what degree requisite, 501.
less than in bill, 501.
defenses must be consistent, 501, 502.

CHARGING PART,
see "Bill in Equity."
distinguished from stating part, 206.
nature and office of, 205, 209.
states facts to obtain admission from defendant, 206.
also to obtain discovery from defendant, 206.
sometimes to support prayer for relief, 207.
or to anticipate defense by charging facts in avoidance, 207.
distinguished from stating part, 208.
ultimate facts stated only in charging part, 208.
when material facts alleged in, 210.

[The figures refer to pages.]

CHARGING PART—Continued,
a convenient, but not essential, part, 210.
stating part may perform same office, 210.

CODE REMEDIES,
supplemental complaint or petition, 296.
governed by general principles of equity method, 296.
cross complaint—counterclaim, 309.
equity method in force when Codes are silent, 309.

COMPLAINANTS,
see, also, "Bill in Equity"; "Demurrer"; "Multifariousness"; "Parties"; "Supplemental Bills."
who may be, in general, 44.
when under disability, 45.
nature of disabilities recognized, 46.
joinder of, 49.
interest controlling as to, 49.
whether complainant or defendant, 60.
persons having common interest, 51.
new party, how brought in, 291.
see, also, "Supplemental Bills."
misjoinder of, 343.
see, also, "Multifariousness."

CONFEDERATING PART,
see "Bill in Equity."
form and object of, 204.
old theory regarding, 204.
now wholly unnecessary, 204.
charge of combination need not be answered, 205.

CONSISTENCY AND DIRECTNESS,
see, also, "Answer"; "Bill in Equity"; "Plea."
inconsistency or repugnancy, 333, 334.
objectionable in equity as at common law, 334.
inconsistent and alternative pleading forbidden, 334.
bills with double aspect, 334.
see "Bills with Double Aspect."
relief sought must be consistent with bill, 335.
on inconsistent states of fact, relief must be same, 335.
ambiguity, 335.
common-law rule applicable, 335.
rule of construction, 335.
pleading taken most strongly against pleader, 335.
allegation sufficient if true meaning can be ascertained, 335.

[The figures refer to pages.]

CONSISTENCY AND DIRECTNESS—Continued,
argumentativeness, 336.
what is, 336.
rule forbids statement of inference or argument, 336.
negative pregnant, 336.
affirmative pregnant, 336.
rule analogous to that of common law, 336.
alternative pleading, 336.
when allowed, 336.
not presenting inconsistent allegations with alternative prayer, 336.
acts in alternative or disjunctive, 336.
direct and positive statements, 336.
scope of rule as to, 336.
all facts within complainant's knowledge, 336.
or necessarily to be so presumed, 336.
pleading according to legal effect, 337.
principles of common-law rule applied in equity, 377.
written instrument, how pleaded in general, 337.
when construction of instrument itself involved, 337.
CONTEMPTS,
defined, 159.
what process may issue for, 159.
commonly, writ of attachment, 159.
rights of party in contempt not recognized in suit, 160.
CREDITORS' BILLS,
see "Bills to Quiet Title"; "Bills to Set Aside"; "Fraudulent Conveyances."
defined, 273.
nature and object of, 273.
when an available remedy, 273, 274.
not always necessary that claim has been reduced to judgment, 274.
attachment creditor can sue without judgment, 274.
judgment lien alone sufficient against real estate, 274.
general rule as to grounds of jurisdiction, 274.
creditor must have lien, or have exhausted all legal remedies, 274.
exception, where administration of estate of deceased person involved, 274.
bills in nature of creditors' bills, 274.
bills to quiet title and set aside fraudulent conveyances, not, 274.
generally regulated by statute, 274.
governing principles, same as in chancery, 274, 275.
the statement of facts, 275.
framed according to object of suit, 275.

[The figures refer to pages.]

CREDITORS' BILLS—Continued,
against real estate, must show judgment at law, 275.
against personal property, issuance and return of unsatisfied execution, 275.
judgment debtors must be residents of county to which execution issued, 275.
fraud, when material must be shown by facts, 275.
general requisites of, 276.
degree of certainty required, 276.
actual or threatened injury, how shown, 276.
prayer, 276.
framed according to object of suit, 276.
general and special, 276.

CROSS BILLS,
defined, 303.
objects, in general, 304.
when an available remedy, 304.
ordinarily available only to a defendant, 304.
restrictions limiting use, 305.
bill must be complete in itself, 305.
must not set up matters proper for answer, 305.
must relate only to original matters in controversy. 306.
generally an imperative method if affirmative relief desired, 306.
when also an appropriate remedy, 306.
court may direct filing, 307.
when filed without leave of court, 307.
proper time for filing, 307.
filing, when directed by court, 307.
distinguished from supplemental bill, 307.
generally taken and heard and decided with original bill, as one cause, 308.
effect of dismissal of original bill, 308.
the statement of facts, 308.
rules governing, 308.
original bill and proceedings thereon, and rights of parties to be determined, 308.
must not contain new matters, 308.
must show complete cause of action, 308.
demurrable in stating matters equally proper for answer, 308.
see, also, "Demurrer."
prayer, 309.
in accordance with object of bill, 309.
general requisites of, 309.

[The figures refer to pages.]

CROSS BILLS—Continued,
when demurrable, 406.
pleas to, when proper, 483, 484.
all pleas to which original bill liable, 483, 484.
except to jurisdiction and to person, 484.
the equivalent code remedies, 309.
none in code pleading save cross complaint, 309.
only allowed for affirmative relief, in some states, 309.
in most states, counterclaim fills same office, 309.
where codes are silent, equity method in force, 309.

CROSS COMPLAINT,
in code pleading, 309.
see "Code Remedies"; "Cross Bills."

D

DECREE,
see "Appeals"; "Assistance, Writ of"; "Attachment, Writ of"; "Bill in Equity"; "Bill of Review"; "Bills to Enforce Decrees"; "Bills to Impeach Decree"; "Bills to Suspend or Avoid Decrees"; "Enforcement of Decree"; "Execution"; "Sequestration, Writ of."
defined and classified, 145.
nature and office of, in equity, 145.
relative position in proceedings, 146.
interlocutory decrees, 146.
defined, 146.
granting, discretionary with court, 146.
orders of reference to master, 147.
distinction between decrees and decretal orders, 147.
none if both interlocutory, 147.
interlocutory or final, the test, 147.
final decree, 148.
defined, 148.
not if material issue undecided, 148.
may be, though directing an interlocutory step, if providing for everything but ministerial acts, 148.
rules as to final decrees not uniform, 148.
generally final, if judicial action complete and merits determined, 148, 149.
the federal rule, 149.
when pleaded in bar, 470.
general requirements, 470.
decree dismissing former suit, when, 471.

[The figures refer to pages.]

DECREE—Continued,
must be final, 471.
must have been signed and enrolled, 471.
consent decrees, 149.
limited by pleadings, 149.
correction or reversal, 150.
methods generally available, 150.
discretionary with court, 150.
discretion, when exercised, 151.
interlocutory decrees, motion or rehearing, 151.
general rule as to correction, 151.
formal defects on motion, 151.
substantial defects, by petition and rehearing, 151.
errors clerical and errors judicial, 151.
when rehearing necessary, 151.
see "Rehearing."
enforcement of decrees, 158.
methods generally available, 159.
opening decrees pro confesso, 85.

DEFAULT,
see "Taking Bill Pro Confesso."
general proceedings available, 78.
on failure of defendant to appear after service, 78.
on failure to plead, after appearance, 78.
for interposing irregular answer, 78.
effect of dismissal of bill as to one of joint defendants, 78.

DEFENDANTS,
see, also, "Bill in Equity"; "Demurrer"; "Multifariousness"; "Parties"; "Supplemental Bills."
who may be, in general, 54.
when exempt or beyond jurisdiction, 54.
rules as to, 55.
joinder of, 55.
unwilling complainant joined as, 56.
new party, how brought in, 291.
see, also, "Supplemental Bills."
misjoinder of, 344.
see, also, "Multifariousness."

DEFENSE,
see "Answer"; "Cross Bill"; "Demurrer"; "Disclaimer"; "Plea."
defined, 86.
classification of defenses, in equity, 86.

[The figures refer to pages.]

DEFENSE—Continued,
necessity for, 86.
dilatory defenses, 86.
defined, 86.
what are, 86, 87.
want of jurisdiction, 87.
usually presented by plea, 87.
disability of complainant, 87.
usually taken by plea, 87.
deny only legal capacity to sue, 87.
objections to form of proceedings, 87.
pendency of another suit, 88.
see "Another Suit Pending."
when an appropriate defense, 88.
peremptory, or permanent defenses, 89.
defined, 89.
classification, 89.
want of complainant's right to sue, 89.
right superior to that of defendant, 89.
want of interest in defendant, 89.
see, also, "Title or Interest."
want of interest in complainant, 90.
see, also, "Title or Interest."
want of privity between complainant and defendant, 90.
see, also, "Privity."
where right has been extinguished or determined, 90.
waiver or abandonment of right of recovery, 90.
see "Release."
determination or decision of matters in dispute, 90.
see "Plea."
formal methods of defense, 90.
general principles as to selection, 91.
disclaimer, 91.
see "Disclaimer."
nature and object of, 91, 353.
demurrer, 92.
see, also, "Demurrer."
nature and object of, 92, 359.
plea, 93.
see, also, "Pleas."
nature and object of, 93, 409.
answer, 94.
see, also, "Answer."

[The figures refer to pages.]

DEFENSE—Continued,
nature and object of, 95, 486.
answer and disclaimer, 95, 354.
replication, 97.
nature and object of, 97, 523.

DEMURRER,
see, also, "Bill in Equity"; "Discovery"; "Inconsistency"; "Multifariousness"; "Uncertainty."
defined, 358.
nature and object of, 92, 359.
when lies, 359.
available only to bill, 359.
method derived from common law, 359.
raises question of law, 360.
grounds of demurrer, 360.
lies either for formal or substantial defects, 360.
only when defects apparent upon face of bill, 360.
rule as to consideration by court, 361.
may extend to whole bill or to any distinct part, 361.
available concurrently with disclaimer, plea, or answer, 361.
when the only defense, 479.
general rule of chancery, 362.
rule in federal courts, 362.
separate demurrers, how taken, 362.
may be incorporated with answer, 363.
must still be separate and distinct, 363.
to whole bill, when overruled, 363.
general demurrer, 363.
defined and explained, 363, 367.
grounds for, in general, 367, 368.
for want of equity, when sufficient, 368.
special demurrer, 363.
defined and explained, 363, 367.
requisites of, in general, 365, 369.
form of general demurrer, 364.
title of cause, 364.
title of demurrer, 364.
introduction or commencement, 365.
must show extent of demurrer, 365.
body of demurrer, 366.
states causes of demurrer assigned, 366.
must indicate part of bill opposed, 366.
number of causes not limited, 366.

[The figures refer to pages.]

DEMURRER—Continued,
demurrer sustained upon one only, 366.
conclusion, 366.
prayer for judgment, 366.
signature and certificate of counsel, 367.
other formal requisites, 367.
consequences of omissions, 367.
bad in part, 370.
rule as to, 370.
principle of rule, 370, 371.
when applied to special demurrers, 371.
when good as to one defendant and bad as to another, 371.
joint demurrer either good or bad as to all parties presenting it, 371.
when too general, 371.
demurrer too narrow—the federal rule, 372.
demurrer ore tenus, 372.
speaking demurrer, 373.
defined, 372.
nature and use of, 372.
admissions by, 374.
the general rule, 374.
common-law rule followed, 374.
theory of admission, 375.
when facts well pleaded, 376.
see, also, "Certainty"; "Consistency and Directness"; "Sufficiency."
illustrations of rule as to, 376.
sustaining or overruling demurrer, 376.
see, also, "Overruling Demurrer"; "Sustaining Demurrer."
effect of order, 376, 377.
rules as to, in general, 376, 377.
final order on, effect of, 381.
see, also, "Final Order on Demurrer."
to original bills for relief, 384.
see, also, "Demurrer to Original Bills for Relief."
to relief and discovery, 384.
see, also, "Demurrers to Relief and Discovery."
to relief only, 386.
see "Demurrers to Relief Only."
to interrogatories, 139.
see "Demurrer to Interrogatories."
to original bills not for relief, 404.
when taken, in general, 404.

[The figures refer to pages.]

DEMURRER—Continued,
to bills not original, 405.
when taken, in general, 405.
to supplemental bills and bills of same nature, 405.
see, also "Supplemental Bills."
to bills of revivor and bills of same nature, 405.
see "Bills of Revivor."
to cross bills, 406.
see, also, "Cross Bills."
to bills of review and bills of same nature, 406.
see, also, "Bills of Review."
to bills to impeach decrees for fraud, 407.
see "Bills to Impeach Decrees."
to bills to suspend or avoid decrees, 407.
see "Bills to Suspend or Avoid Decrees"; "Decrees."
to bills to enforce decrees, 407.
see, also, "Bills to Enforce Decrees."

DEMURRER ORE TENUS,
nature and use, 372.
must cover extent of original demurrer, 373.
not allowed to part of bill, 373.
see, also, "Demurrer."

DEMURRER TO INTERROGATORIES,
defined, 139.
when allowed, 139.
object of, 139.
witness may decline to answer under, 139.
distinguished from ordinary demurrer, 139.
where penalty or forfeiture would be incurred, 140.
need not be direct admission, 140.
answer tending to show liability, sufficient, 140.
breach of professional confidence, 140.
see "Professional Confidence."
right to withhold answer privilege of client, not witness, 141.

DEMURRERS TO ORIGINAL BILLS FOR RELIEF,
see, also, "Demurrer."
classified, 384.

DEMURRERS TO RELIEF AND DISCOVERY,
see "Demurrer."
what objection good to both, 384, 390.
the American rule, 384.
when defendant may answer, and also demur to relief, 386.

[The figures refer to pages.]

DEMURRERS TO RELIEF AND DISCOVERY—Continued,
when demurring to relief only, must give discovery, 886.
specific grounds of objection, 386.
DEMURRERS TO RELIEF ONLY,
see "Demurrer."
nature and use, 386.
objections taken by, 386.
objections to jurisdiction, 387.
see, also, "Jurisdiction."
three principal classes, 387.
cases without the jurisdiction of equity, 387.
facts showing, in general, 387, 388.
adequate remedy at law, 387.
failure to show jurisdiction affirmatively, 888.
nonresident defendants, 388.
insufficient value of subject-matter, 388.
money voluntarily paid, 388.
statute of limitations, 388.
general or special demurrer, 388.
where another court of equity has jurisdiction, 389.
not often taken, except in federal courts, 389.
nature of objection, in general, 389.
where another court has jurisdiction, 389.
sufficient ground, when fact apparent, 389.
when it may arise, 389.
objections to person of complainant, 390.
see, also, "Complainants"; "Parties."
when taken, 390.
analogous to pleas in abatement, 390.
want of capacity to sue, 390.
see, also, "Title or Interest."
grounds of the objection, in general, 390.
extent of demurrer for, 390.
may be taken to bills for discovery and for relief, 890.
want of title to character assumed, 391.
proper objection, when defect apparent, 391.
administrator suing here under foreign letters, 391.
voluntary association suing as corporation, 391.
objections to frame or form of bill, 892.
what are included, 392.
formal defects, 892.
what may be, 392.

[The figures refer to pages.]

DEMURRERS TO RELIEF ONLY—Continued,
want of certainty cured by explanatory allegation, 392, 393.
great variety of circumstances, no ground for demurrer, 393.
multifariousness, 393.
when ground for demurrer, 393.
see "Multifariousness."
want of, defect of, or misjoinder of parties, 394.
see, also, "Misjoinder"; "Parties."
when ground for demurrer, 394.
by whom objection taken, 394.
demurrer for want of necessary parties, must show what, 395.
misjoinder, when taken at hearing, 395.
objections to substance of bill, 395.
grounds for, in general, 395.
insufficient value of subject-matter, 396.
see, also, "Value of Subject-Matter."
insufficient statement of subject-matter, 397.
see, also, "Cause of Action."
laches, 397.
see, also, "Laches."
when ground for demurrer, 397.
statute of frauds, 399.
see, also, "Statute of Frauds."
when ground for demurrer, 399.
another suit pending, 399.
see, also, "Another Suit Pending."
when ground for demurrer, 399.
to discovery alone, 400.
when taken, in general, 400.
discovery involving penal liability, 401.
scope of rule, 402.
sufficient if result may follow, 402.
immateriality of discovery sought, 402.
breach of professional confidence, 403.
see, also, "Breach of Professional Confidence."
where defendant's title mostly concerned, 403.
see, also, "Title or Interest."
limits of complainant's right to discovery, 403.
where equities are equal, 404.
see, also, "Equity."
bona fide purchaser for value, 404.
see, also, "Bona Fide Purchaser."

[The figures refer to pages.]

DENIAL OR TRAVERSE,
see "Anomalous Pleas"; "Answer"; "Negative Pleas"; "Plea."
in answer, 489.
analogous to special traverse at common law, 491.

DIRECTNESS,
in pleading, 333.
see "Consistency and Directness."
general rule, 333.

DISCLAIMER,
see, also, "Defense."
defined, 353.
nature and use, 91, 353.
generally incorporated with answer, 354.
when used alone, 354.
not when bill states facts beyond mere charge of interest, 355.
nor where agent charged with personal fraud, 355.
cannot be used to avoid an actual liability, 355.
alone, must show entire absence of liability, 357.
after assignment of interest pending suit, 357.
may be joined with demurrer, plea, or answer, when, 357.
when overruled by other modes of defense, 357.

DISCOVERY,
see, also, "Bills of Discovery."
limits of complainant's right to, 403.
none, where equities equal, 404.
in answer, how made, 506, 507.
when must be given by answer, 451.
exception, 451.
when court will not compel, 450.
pleas to discovery alone, 478.
objections to particular discovery, 401.
what objections taken, 478.
pleas to discovery and relief, 449.
when good to, 449.
when incidental to relief, plea, 451.
demurrer to, alone, when taken, 400.

DUPLICITY,
see, also, "Multifariousness"; "Plea."
in plea, objectionable, 416.
when fault exists, 416.
must contain but one defense, in general, 416.

[The figures refer to pages.]

DUPLICITY—Continued,
principle of the rule, 416, 417.
various facts forming a single point, 417.

E

ENFORCEMENT OF DECREES,
see "Assistance, Writ of"; "Bills in Equity"; "Contempts"; "Decrees"; "Execution, Writ of"; "Sequestration, Writ of."

EQUITY,
see, also, "Demurrer."
want of, in bill, when ground for demurrer, 395.
equal equities, ground for objection to discovery, 404.

EVIDENCE,
see "Admissions"; "Answer"; "Demurrer to Interrogatories."
when taken, 129.
object and effect of, 129, 130.
admissions, 130.
testimony proper, 131.
how taken, 131.
changes as to method, 131.
time allowed for, generally, 131.
federal rule as to, 131.
when taken after hearing, 131.
when necessary to decree, 131.
correction of excusable errors or omissions, 131.
newly-discovered evidence, 131.
depositions, 132.
letters rogatory, 132.
publication of testimony, 132.
defined, 132.
answer as evidence, 133.
see, also, "Discovery"; "Responsiveness"; "Sufficiency."
general rule explained, 134.
when it will be, in general, 133.
qualifications, 133.
answer must be full, 134.
must also be responsive, 134, 135.
see "Responsiveness."
allegations not responsive must be proved, 135.
rule places burden of proof on complainant, 135, 136.
weight of answer destroyed by inconsistency, 136.
or by circumstances, without oral testimony, 136.

[The figures refer to pages.]

EVIDENCE—Continued,
answers not evidence, 136.
on information and belief, 136.
answer alleging ignorance, 137.
denials of inferences or conclusions of law, 137.
founded upon hearsay, 137.
as between several defendants, 137.
general rule, 137.
not generally evidence against co-defendant, 137.
unless claiming through party answering, 137.
or where joint interest or liability exists, 137.
or when one adopts answer of another, 137.
if responsive is evidence in favor of co-defendant, 138.
not against defendant really complainant, 138.
as between complainant and defendant, 138.
for complainant, when, 138.
for defendant, when, 138.
hearing on bill and answer only, 138.
effect of answer much greater, 138.
answer conclusive, though not responsive, 138.

EXCEPTIONS,
see "Answer"; "Defense."
to answer, 96.
when and for what purpose taken, 96.
defects in form, 96.
for insufficiency, 96.
answer not responsive, 96, 523.
for scandal, 96.
impertinence, 96.
form of exceptions, 96, 97.

EXECUTION,
see "Writ of Execution"; "Decrees"; "Enforcement of Decrees."

F

FEIGNED ISSUES,
what are, 112.
when evidence is conflicting and unsatisfactory, 113.
illustrations, 113.
award discretionary with court, 113.
application for, how made, 114.
must be by party to suit, 114.
ancient and modern form, 115.

[The figures refer to pages.]

FEIGNED ISSUES—Continued,
distinction between, and directing action at law, 115.
waiver of right to jury trial, 115.
new trial after verdict on issues, 116.
when applied for, 116.
on what grounds awarded, 116.

FINAL DECREE,
see "Decree."
defined, 148.
general nature of, 148, 149.

FINAL ORDER ON DEMURRER,
see, also, "Demurrer."
effect of, when embracing merits, 381.

FORECLOSURE OF MORTGAGES,
see "Bills to Foreclose Mortgages."

FRAUD,
see, also, "Bills to Impeach Decrees"; "Bills to Set Aside Fraudulent Conveyances"; "Certainty."
how pleaded, in general, 268, 269 and note 25, 329.
in creditors' bill, when alleged, 275.
as ground to impeach decree, 316, 317.
in bills to set aside fraudulent conveyances, 267, 268.

FRAUDULENT CONVEYANCES,
see "Bills to Set Aside Fraudulent Conveyances."

FRAUDULENT INTENT,
see "Bills to Set Aside Fraudulent Conveyances."

G

GENERAL DEMURRER,
see, also, "Demurrer."
defined, 363.
when used, 363, 367.
scope of, 363, 367.

GROUNDS OF DEMURRER,
see, also, "Demurrer."
how considered, 384.

H

HEARING,
interlocutory hearings, 141.
final hearing, 141.
full presentment of cause, 142.

[The figures refer to pages.]

HEARING—Continued,
cause examined on merits, 142.
general practice as to arguments, 142.
right to open and close, 142.
burden of proof, 142.
objections taken at hearing, 143.
formal objections generally waived if not taken before, 143.
but not want of equity jurisdiction, 143.
indispensable party brought in, 143.
test as to allowance of objections, 143.
dismissal of bill at hearing, 142, 143.
for want of prosecution, 143.
failure to take issue on plea, 143.
or to set down plea or demurrer for argument, 143.
rule in the federal courts, 143.
filing of replication allowed nunc pro tunc, when, 143.
when answer completely denies equities, and not replied to, 143.
extent of the last rule, 144.
complainant's neglect to amend, when required, 144.
failure to prove joint cause of action, or joint liability, 144.
effect of dismissal, 144.
for formal or technical defects, 144.
dismissal "without prejudice," 144.
operates only as abatement, 144.
absolute dismissal, 144.
bars right of action, 144.
saving benefit of plea for, 431.

I

IMMATERIALITY,
see, also, "Discovery."
of discovery sought, 402.
ground of demurrer, 402.
"immateriality" used in broadest sense, 402.

"IMPERTINENCE,"
see, also, "Answer"; "Bill in Equity."
defined, 349.
in bill, 349.
in answer, 502, 504.
general rule as to, 349.
signature of counsel required against, 350.
test generally adopted, 350.
illustrations as to pertinency or relevancy, 350.

[The figures refer to pages.]

"IMPERTINENCE"—Continued,
what, in general, will be "pertinent," 350.
pertinent matters improperly stated, 350.
setting out deed in hæc verba, 350.
scandalous matter always impertinent, 351.
converse not true, 351.
consequences of, 351.
not open to demurrer, 351.
exception the proper method, 351.
procedure in federal courts, 351.

INFRINGEMENT OF PATENTS,
see "Bills for Infringement of Patents."

INJUNCTION,
defined, 117.
general classification, 117.
nature and object of the remedy, 118.
when granted, in general, 118.
to restrain proceedings at law, 119.
to prevent breach of negative contract, 119.
to prevent commission of tort, 120.
to prevent breach of trust or violation of equitable rights, 122.
mandatory, 117.
prohibitory, 117.
preliminary injunctions, 122.
defined, 117, 122.
how issued, 123.
practice upon application for, 123.
conditions precedent to issue, 123.
want of adequate remedy at law, 123.
legal remedy, if any, must be then full and complete, 123.
threatened irreparable injury, 123.
"irreparable injury" defined, 123, 124.
perpetual injunctions, 124.
defined, 117, 124.
nature and object of, 124.
general rule as to issuance, 125.
instances of application, 125.
usually part of final decree, 125.
continuance of preliminary injunction, 125.
issued only after hearing on merits, 125.
to sustain foreign judgment, 125.
to protect against void judgment, 125.

[The figures refer to pages.]

INJUNCTION—Continued,
judgment bond obtained by fraud, 125.
vexatious litigation, 125.
when modified or set aside, 125.

INTERLOCUTORY BILLS,
defined and classified, 290.
see "Bills of Revivor"; "Bills of Revivor and Supplement"; "Supplemental Bills."

INTERLOCUTORY DECREES,
see "Decree."
defined, 146.
for what purposes, in general, 146, 147.

INTERLOCUTORY PROCEEDINGS,
see "Amendment"; "Feigned Issues"; "Injunction"; "Intervention"; "Motions"; "Ne Exeat"; "Payment of Money into Court"; "Petitions"; "Production of Documents"; "Receivers"; "Reference to Master."

INTERROGATING PART,
see "Bill in Equity."
nature and object of, 212.
prays for full answer by defendant, 212.
designed to prevent evasion, and to compel full answer, 213, 214.
interrogatories must be justified by preceding allegations of bill, 214.
if not, defendant need not answer, 215.
answer, replied to, cures informality, 215.
variety of questions founded on single charge, 215.
not an essential part of bill, 216.
special object, with charging part, to compel discovery, 217.
special interrogatories to be founded on charging part, 217.
practice in federal courts, 218.
special provisions of equity rules 40, 41, and 42, 219.

INTERVENTION,
defined, 127.
when an available remedy, 127.
third party interested in subject of litigation, 127.
allowed only on leave of court, 128.
leave, how and when applied for, 128.

INTRODUCTION,
see "Bill in Equity."
formal part of bill, 183.

[The figures refer to pages.]

INTRODUCTION—Continued,
nature and requisites of, 183, 186.
follows address or direction, 183.
must give full description of parties, 184.
form of, 185.
description and place of abode of next friend or infant necessary, 185.
consequences of defective averments, 186.
not aided by caption or title, 186.

J

JOINT TENANTS,
must sue together, 57.

JUDGMENT,
see "Decrees"; "Pleas in Bar."
at law, when a bar in equity, 469.
when a defense by plea, 469.
when a sufficient bar, 469.
foreign judgments, 469.
when pleaded in bar, 469.
generally, if foreign court had jurisdiction, 469.
exceptions, fraud, mistake, etc., 470.
judgments of other states within the rule, 470.

JURISDICTION,
see "Bill in Equity"; "Demurrer"; "Plea."
objections to, as ground of demurrer, 387.
objections to, by plea, 454.

JURISDICTION CLAUSE,
see "Bill in Equity."
nature and office of, 211.
useless in modern practice, 211.
jurisdiction dependent upon facts shown, not averment, 211.

L

LEAVE OF COURT,
see "Bill of Review."
in case of supplemental bills, 293, 304.
unnecessary for bill to impeach decree for fraud, 317.
or cross bill, 307.
when necessary for amendment, 99–103.
for bill of review, 310–312.

[The figures refer to pages.]

M

MASTER IN CHANCERY,
establishment and duties of the office, 111, 112.
see "Reference to Master."
MATTERS IN PAIS,
see "Pleas in Bar."
when ground of plea, 472.
what matters pleaded, 472.
release, 472.
when pleaded as defense, 472.
stated and settled accounts, 473.
defined, 473.
when pleadable in bar, 473.
denial in plea, when, 474.
when supported by answer, 474.
necessary averments in plea, 474.
award, plea of, 474.
see, also, "Award."
requisites to constitute bar, 474.
purchaser for valuable consideration, plea of, 474.
see, also, "Purchaser for Valuable Consideration."
when pleaded in bar, 475.
substantial requirements of plea, 475.
notice, when denied, 476.
when supporting answer necessary, 476.
title in defendant, plea of, 476.
see, also, "Title or Interest."
MISJOINDER,
see, also, "Multifariousness."
of parties, 57, 343, 344, 394.
when ground for demurrer, 394.
MISTAKE,
as ground for reforming instrument, 258.
see "Bills to Reform Instruments."
MOTIONS,
defined, 164.
for oral interlocutory application to court, 164.
instances of use, 165.
distinguished from petition, 165.
motions as of course, 165.
special motions, 165.

[The figures refer to pages.]

MOTIONS—Continued,
cannot present matters proper for pleading, 165.
limitation of motions, 165.

MULTIFARIOUSNESS,
see "Bill in Equity"; "Demurrer"; "Plea."
rule as to, 337.
in bill, defined, 337.
in plea, what is, 418.
causes of, 337, 338.
what it includes, in general, 338.
nature of different objections, 338.
renders bill demurrable, 339.
summary of accepted definitions, 339.
existence of fault dependent upon particular allegations and frame of bill, 339.
misjoinder of causes of action, 339.
nearly resembles duplicity at common law, 339.
in what the fault consists, 339, 340.
combining unconnected matters requiring different answers, 340.
question of fact for discretion of court, 340.
grounds stated must be wholly distinct and independent, 340.
each ground a complete cause of action, 340.
suit for single object, not necessarily affected by allegations, 340
illustrations of bills held multifarious, 340, 341.
illustrations of bills held not objectionable, 341, 342.
objectionable grounds disregarded, when, 343.
only when matters distinct and independent, 343.
misjoinder of complainants, 343.
see, also, "Misjoinder of Parties"; "Parties."
when ground for objection, 343.
two persons asserting joint, and also several, demands, 343.
bill by complainants jointly to enforce distinct promissory notes, 343.
suit by several to restrain nuisance, 343.
the test established, 343.
all who join must have common interest, 344.
all or none must recover, 344.
general application of rule, 344.
distinct matters, when united, 344.
persons having successive interests in same trust, 344.
tenant for life and remainder-man, 344.
misjoinder of defendants, 344.
see, also, "Misjoinder of Parties"; "Parties."

[The figures refer to pages.]

MULTIFARIOUSNESS—Continued,
when ground of objection, 344, 345.
separate case stated against each of several joint defendants, 345.
what interest will warrant joinder, 345.
bills multifarious illustrated, 345, 346.
bills not multifarious illustrated, 346, 347.
question, in discretion of court, 347.
consequences of multifariousness, 347.
see, also, "Demurrer"; "Plea."
bill demurrable, when defect apparent, 347, 393.
method by plea, when not, 8, 464.
when objection waived, 347.
waiver not always implied, 347.
dismissal of bill by court, when, 347.
MULTIPLICITY OF SUITS,
see, also, "Splitting Cause of Action."
when defense by plea, 464.

N

NE EXEAT,
defined, 128.
nature and origin of the remedy, 128.
when writ granted, 128.
only for certain equitable demand, 128.
exceptions to rule, 128, 129.
NEGATIVE PLEAS,
see, also, "Plea."
defined, 435.
when available, 435.
principle of use, 435.
when accompanied by answer, 444, 445.

O

OATH,
see, also, "Answer"; "Demurrer"; "Plea"; "Verification."
when required to answer in equity pleading, 495.
when waived, 4, 496.
not by corporation, 495.
verification of plea, 4.
ORIGINAL BILLS FOR RELIEF,
see "Bill in Equity."
pleas to, classified, 449.

[The figures refer to pages.]

OVERRULING DEMURRER,
when action taken, 376.
effect of order, 376, 377.
interlocutory merely, 376.
see, also, "Demurrer."
the rules illustrated, 388.
practice usually followed, 379.
answer generally required, 380.
on failure to answer, bill taken pro confesso, 380.
see, also, "Taking Bill Pro Confesso."
no demurrer after demurrer overruled, 380.
doctrine in federal courts, 382, 383.

OVERRULING PLEA,
see, also, "Plea."
what thereby determined, 429.
defendant required to answer, 429.
consequences of failure to answer, 429, 430.
see, also, "Taking Bill Pro Confesso"; "Writ of Attachment."
supporting answer, how treated, 430.
no further plea without leave of court, 430.

P

PARTIES,
general rules as to, 13.
principles supporting rules as to joinder, 13.
nature of interest required, 15.
strangers in interest joined for discovery, 17.
persons claiming under inconsistent titles, 18.
the rules not arbitrary, 18.
classification of parties, 19.
necessary parties, defined, 19.
necessary parties, illustrated, 21.
exceptions to rule as to, 24.
persons having very small interests, 27.
interests created to oust jurisdiction, 27.
persons against whom rights are waived, 28.
persons legally represented, 28.
executors and administrators, 28.
trustees and beneficiaries, 30.
rule as to parties, when trusts are involved, in the federal courts, 32.
persons claiming under common right, or having common interest, 33.
stockholders, partners, or bondholders, 34.

[The figures refer to pages.]

PARTIES—Continued,
numerous persons jointly liable, one or more representing all, 34.
the federal rule where parties are very numerous, 35.
proper, but not indispensable, parties, who may be, 36.
formal parties, defined, 36.
joinder or omission not generally ground of objection, 37.
parties with separable interests, 36.
must be joined if within reach of court, 38.
test adopted as to persons without the jurisdiction, 39.
illustrations of rule as to parties with separable interests, 40.
when such parties may be omitted, 36, 41.
parties complainant, who may be, 44.
natural or artificial persons, 45.
corporations either municipal or private, 45.
foreign states, corporations, or sovereigns, 45.
foreign executors and administrators, 45.
United States as complainant, 45.
persons under absolute disability, 46.
alien enemy the only instance, 46.
persons under partial disability, 46.
partial disability affects person only—right to sue still effective, 46.
infants, 47.
persons of unsound mind, 47.
married women, 47.
real party in interest, 48.
joinder of parties, 49.
complainants must have either joint or common interest, 49.
persons united in interest must join, 49.
unwilling complainant made defendant, 49.
persons having common interest should join as complainants, 51.
distinction between this and rule as to joint interests, 52.
persons to be joined—extent of interest, 53.
parties defendant, who may be, 54.
all persons liable, unless exempt or beyond jurisdiction, 54.
not when decree cannot be rendered against them, 54.
natural and artificial persons, 54.
cannot be, against whom there can be no decree, 54.
United States as defendant, 54.
waiver of exemption by, 55.
suit against state by citizens of another, 55.
none against foreign states or sovereigns, 55.
receivers of state courts, 55.

[The figures refer to pages.]

PARTIES—Continued,
joinder of defendants, 55.
rules as to, 55, 56.
foreign executors and administrators, 56.
persons united in interest, 56.
joint owners, joint contractors, etc., 56.
rules not applicable to joint and several contracts, 57.
joint tenants, 57.
modification of rule as to joinder—survivorship, 57.
tenants in common, 57, 248.
See "Joint Tenants"; "Tenants in Common."
personal representatives of deceased obligor to be joined, when, 57.
misjoinder of defendants, 57.
see, also, "Demurrer"; "Multifariousness"; "Plea."
joint interest, when unnecessary between defendants, 58.
defendants having common interest, 58.
joinder without joint interest, 58.
persons having common point of interest, 58.
illustrations of rule, 59.
complainant or defendant, 60.
restatement of the rule, 60.
difference as to relations of, 60

PARTITION,
see "Bills for Partition."

PAYMENT INTO COURT,
when ordered, in general, 108.
power discretionary with court, 108.
conditions of its exercise, 108.
illustration, 108, 109.
form of application for order, 109.
facts to be shown, 109.
effect of voluntary payment, 109.
effect of payment under order, 109.

PENALTY OR FORFEITURE,
liability to, when objection to discovery, 401, 402.

PETITION,
defined, 164.
generally for same subject-matter as motion, 165.
but made only in writing, 165.
may be made by one not party to record, 165.

[The figures refer to pages.]

PLEA,
see "Admissions"; "Anomalous Pleas"; "Defense"; "Negative Pleas"; "Pure Pleas."
defined, 408.
nature and object of, in general, 409.
when available, 409.
special answer, 410.
distinguished from answer proper, 410.
distinguished from demurrer, 411.
see, also, "Demurrer."
sets up matter of fact dehors bill, 411.
seeks to bar or dispose of present suit, 412.
raises question of law on its own sufficiency, 412.
issue of fact against bill, 412.
admissions by, 422.
see, also, "Admissions."
available only to bill, 412.
office of, in general, 413.
presents fact in avoidance, 413.
to displace, not deny, equity of bill, 413.
what facts may be presented, 413.
extent, 414.
to whole bill or distinct part, 414.
several pleas to separate parts, 414.
must point out part opposed, 414.
when too general, 414.
may be bad in part, 415.
see, also, "Demurrer."
rule, how applied, 415.
when overruled by answer, 415.
see, also, "Answers in Support of Pleas."
double pleas, 416.
see, also, "Duplicity."
not allowed, 416.
several pleas by leave of court, 417, 418.
informality, how waived, 418.
multifariousness in plea, 418.
see, also, "Multifariousness."
what constitutes, 418.
form of plea, 419, 420.
formal and substantial requisites, 421.
form of plea and answer, 422.

[The figures refer to pages.]

PLEA—Continued,
admissions by plea, 422.
see, also, "Admissions"; "Evidence."
generally, constructive only, 422.
for argument only, 423.
not effective, if plea overruled, 424, 425.
conclusive, if plea allowed or placed in issue, 424.
leave to amend on allowance of plea, 429.
see, also, "Amendment."
plea allowed, as bar to part of bill, 429.
overruling plea, 429.
see also, "Overruling Plea."
what thereby determined, 429.
saving benefit of plea to hearing, 431.
when ordered to stand for answer, 431.
see, also, "Plea Standing as Answer."
form of pleas, 432.
how divided, 432.
pure pleas, 432.
see, also, "Pure Pleas."
negative pleas, 435.
see "Negative Pleas."
anomalous pleas, 436.
see "Anomalous Pleas"; "Answers in Support of Pleas."
to original bills for relief, 449.
to both relief and discovery, 449.
general rules, 449.
good to relief, when good to discovery, 450.
if valid bar to relief, court will not compel discovery, 450.
the American rule, 450.
if discovery incidental to relief, 450.
and objection pleaded to both relief and discovery, 451.
when plea limited to relief, discovery must be given by answer, 451.
exception, discovery in supporting answer, 451.
specific grounds of objection, 452,
to relief alone, 452.
how classified, 452.
pleas in abatement, 452.
not properly so called, in equity, 452.
grounds of abatement recognized, 453.
object to delay or defeat particular suit, 453.
matters in abatement improper for answer, 453.

[The figures refer to pages.]

PLEA—Continued,
pleas in bar, 453.
what are, 453.
pleas to jurisdiction, 453.
defined, 454.
particular grounds of, 454.
general classification, 454.
when taken to bills of discovery, 481.
when no jurisdiction in equity, 454.
most properly for demurrer, 454.
when another court of equity has jurisdiction, 455.
see, also, "Demurrer"; "Jurisdiction."
objection by plea, when, 455.
not by answer to merits, 455.
where another court has jurisdiction, 455.
see, also, "Demurrer."
pleas to person, 456.
see, also, "Misjoinder"; "Parties."
pleas to the bill, 460.
see, also, "Pleas to the Bill."
to bill to impeach decree for fraud, 472.
see, also, "Bills to Impeach Decrees for Fraud."
substance of plea, 472.
to discovery, 478.
see, also, "Pleas to Discovery."
to original bills not for relief, 479.
what objections available, 479.
forms of bill not open to plea, 479.
when demurrer the only defense, 479.

PLEADINGS IN EQUITY,
the system, in general, 1.
nature and object of the pleadings, 3.
of what the formal pleadings consist, 3.
origin and development of the method, 4.
historically associated with equity jurisprudence, 4.
establishment of English court of chancery, 5.
derivation of the equity system, 7.
equitable jurisdiction in the United States, 7, 8.
jurisdiction limiting use—the rule, 8.
test of equity jurisdiction in the United States, 9.
analogy between equity and common-law pleadings, 10.
equity pleading under the codes, 11.

[The figures refer to pages.]

PLEA OVERRULED BY ANSWER,
see "Answer"; "Plea."
the chancery rule, 447.
the federal rule, 448.

PLEAS IN BAR,
see "Plea."
defined, 464.
what pleas available to bills of discovery, 482.
when legal defense pleaded, 482.
how classified, 465.
object, in general, 465.
bar created by statute, 465.
what may constitute, 465.
statute of limitations, 465.
see, also, "Statute of Limitations."
method of pleading, 465.
state statute, how set up, 466.
laches in absence of statute, 466.
see, also, "Laches."
when a pure plea, 466.
see, also, "Pure Pleas."
when requiring supporting answer, 466.
see, also, "Answer Supporting Plea."
statute of frauds, 467.
see, also, "Statute of Frauds."
other statutes, 468.
what may be pleaded, 468.
bar created by matter of record, 468.
grounds of plea, 468.
judgment or decree, when a sufficient bar, 468.
requisites to create the bar, 468.
each suit between substantially same parties, 468.
judgment must be final determination on the merits, 469.
subject-matter the same, and same result in view, 469.
decree not involving merits, no bar, 469.
see, also, "Decrees."
judgments at law, 469.
see, also, "Judgments."
decrees in equity, 469.
see, also, "Decrees."
matter in pais, 472, 476.
see "Matters in Pais."

[The figures refer to pages.]

PLEAS IN BAR—Continued,
requisites of plea, 472.
when supported by answer, 472.
PLEA STANDING AS ANSWER,
when ordered, 431.
effect of order, 431, 432.
proceedings on, 432.
PLEAS TO BILLS OF DISCOVERY,
see, also, "Discovery"; "Plea."
office of, 480.
on what grounds supported, 480.
how classified, 480.
demurrer and plea the only defenses, 480.
in general, 480.
grounds similar to demurrers, 480.
to jurisdiction, 481.
see "Pleas to the Jurisdiction."
grounds of plea, 481.
to the person, 481.
see, also, "Pleas to the Person,"
grounds of plea, 481.
general requirements as to, 481.
to bill or frame of bill, 481.
see "Pleas to the Bill."
in bar of discovery, 482.
see "Pleas in Bar."
to supplemental bills and bills of same nature, 483.
see, also, "Supplemental Bills."
to bills of revivor and bills of same nature, 483.
see, also, "Bills of Revivor."
to cross bills, 483.
see, also, "Cross Bills."
to bills of review and bills of same nature, 484.
see, also, "Bills of Review"
to impeach decrees, 485.
see, also, "Bills to Impeach Decrees."
to carry decrees into execution, 485.
see "Bills to Enforce Decrees."
PLEAS TO DISCOVERY,
see "Discovery"; "Plea."
what objections available, 478.
none also good to relief, 478.
objections to particular discovery, 479.

[The figures refer to pages.]

PLEAS TO DISCOVERY—Continued,
when pleaded to discovery alone, 479.
what objections available, 479.

PLEAS TO JURISDICTION,
see "Plea."

PLEAS TO RELIEF,
see "Plea."
pleas to relief alone, 452.
how classified, 452.

PLEAS TO THE BILL,
see "Another Suit Pending"; "Demurrer"; "Multifariousness"; "Multiplicity of Suits"; "Plea."
defined and classified, 460.
in general, 460.
not generally available to bill of discovery, 481.
for multifariousness, may be, 482.
what other grounds, 482.
distinguished from pleas to jurisdiction and in bar, 460.
resemble common-law plea in abatement, 460.
essential requisites of, 461.
substantially same parties, 461.
objection illustrated, 461.
subject-matter same in each suit, 461.
and justify same relief, 461.
pending suit at common law no defense in equity, 462.
see, also, "Another Suit Pending."
procedure upon, 462.
want of proper parties, 462.
when proper for plea, 462.
goes to both relief and discovery, if relief prayed, 463.
when defect excused, 463.
must point out parties necessary, 463.
effect of plea, 463.
when overruled, 463.
when improper, 463.
substance and effect of, 464.
see, also, "Demurrer."
pleas in bar, 464.
see, also, "Pleas in Bar."

PLEAS TO THE PERSON,
see "Misjoinder"; "Parties"; "Plea."
defined and classified, 456.

[The figures refer to pages.]

PLEAS TO THE PERSON—Continued,
when used, 456.
when taken to bill of discovery, 481.
of complainant, 456.
when proper, 456.
want of capacity to sue, 457.
see, also, "Demurrer"; "Title or Interest."
when objection exists, 457.
good to bills both for discovery and for relief, 457.
objection, matter in abatement, 457.
want of title to character assumed, 457.
in nature of abatement, 457.
illustrations of the method, 457.
principle of plea, 458.
title or interest incorrectly stated, 458.
want of privity, when ground, 458.
of defendant, 459.
see, also, "Defendant"; "Parties."
grounds of, 459.
when sued in wrong character, 459.
when not liable, though perhaps interested, 459.

PRAYER,
see "Bill in Equity"; "Prayer for Process"; "Prayer for Relief."

PRAYER FOR PROCESS,
see "Process for Appearance."
final formal part of bill, 233.
nature and object of, 233, 234.
regular process, writ of subpœna, 234.
must describe parties defendant, 234.
in federal practice must contain same description as introduction, 235.
form generally dependent upon rules or statutes, 236.
omission may render bill demurrable, 237.
waived by defendant's answering without, 237.
practice as to parties out of jurisdiction, 237.

PRAYER FOR RELIEF,
see "Bill in Equity."
formal request to court for desired relief, 220.
scope of, in general, 220.
follows interrogatory part, 221.
an essential part of bill, 221.
may be general or special, 221.
what relief granted under general prayer, 221.

[The figures refer to pages.]

PRAYER FOR RELIEF—Continued,
how used, in practice, 223.
rule in the federal courts, 224.
writs of injunction, etc., or special orders, must be specially prayed for, 225.
form and extent of special prayer, 226.
if no general prayer, complainant limited to relief specially prayed for, 226.
accompanying general prayer cannot extend relief beyond what facts alleged will warrant, 227.
nor relief distinct from or inconsistent with that specially prayed for, 226.
special prayer amended, when, 228.
alternative prayer, when allowed, 228.
bill praying improper relief, demurrable, 229.
general prayer, when ordinarily sufficient, 229.
offers and waivers, 230.
usually inserted in prayer, 230.
rule in equity as to offers of performance, 230.
in cases of specific performance, 231.
cancellation of void security, 231.
want of proper offer renders bill demurrable, 233.
waiver, by complainant, to obtain full discovery, 233.

PRIVITY,
see "Bill in Equity."
when necessary to appear in bill, 202.
when essential, must be shown, 202.
between principal and agent, 202.
none between agent and cestui que trustent of principal, 202.
showing relieves from more particular statement of title, 203.
heir, executor, or administrator of deceased party, 300.
revivor, when dependent upon, 300.
want of, when ground for plea, 458.
when ground for demurrer, 395.
see, also, "Demurrer."

PROCEEDINGS IN EQUITY SUIT,
in general, 62.

PROCESS,
see "Enforcement of Decrees"; "Execution"; "Injunction"; "Process for Appearance"; "Subpœna"; "Writ of Assistance"; "Writ of Attachment"; "Writ of Sequestration."

[The figures refer to pages.]

PROCESS FOR APPEARANCE,
see, also, "Appearance"; "Subpœna"; "Writ of Attachment."
nature of, in equity procedure, 65.
subpœna the common method, 65.
early method of procedure, 66.
nature and object of subpœna, 67.
effect of irregular issue, 68.
subpœna in federal practice, 68, 69.
return day, how fixed, 69.
service of, 70.
by whom made, 70.
when by private person, 70.
effect of service, 71.
methods of service, 71, 72.
return of service, 72.
how and by whom made, 72.
what it must show, 72.
substituted service, 72.
when ordered, 73.
amendment of, 73.

PRODUCTION OF DOCUMENTS,
a remedy of equity, 126.
when ordered, 126.
when complainant entitled to, 126.
must be relevant to case made by bill, 126.
also part of proper discovery, 126.
in possession or under control of defendant, 126.
not for defendant against complainant, except when, 126.
when ordered by court, of its own motion, 126.
protection of defendant, rule as to investigation, 127.

PROTESTATION,
see, also, "Demurrer"; "Plea."
form and effect of, in demurrer, 365.
in plea, 420.

PURE PLEAS,
see, also, "Plea."
defined, 433.
requisites of, 433.
when available, 433.
requires no supporting answer, 434, 443.

[The figures refer to pages.]

Q

QUIETING TITLE,
see "Bills to Quiet Title."

R

RECEIVERS,
defined, 104.
how appointed, 104, 105.
when power of court exercised, 105.
illustrations, 105.
appointment discretionary with court, 106.
conditions precedent to appointment, 106.
when application made, 106, 107.
essential grounds of, 107.
ex parte applications, when granted, 107.
waiver of notice, 107.
character and authority of receiver, 107.

REDEMPTION,
see "Bills to Redeem."

REFERENCE TO MASTER,
see "Master in Chancery."
when ordered, 109.
upon application of parties, 110.
by court, of its own motion, 110.
whole case referred, when, 110.
powers of master on reference, 110, 111.
authority limited by order, 111.
scope and effect of report, 111.
exceptions to report, 111.
proceedings on, 111.

REFORMATION OF INSTRUMENTS,
see "Bills to Reform Instruments."

REHEARING,
see "Decrees."
when allowable, 151, 152.
nature of the proceeding, 152.
discretionary with court, if applied for in season, 152.
when decree corrected upon, 152.
final decrees before enrollment, 152.
decree, when enrolled, 152.
jurisdiction lost with close of term at which decree rendered, 152

[The figures refer to pages.]

REHEARING—Continued,
granted upon petition of a party to the record, 152.
petition must state facts fully, 152.
the federal rule, 152.

REPLICATION,
see, also, "Admissions"; "Defense."
defined, 97, 523.
order in series, 523.
general nature of, 523.
special, not now used, 523.
effect of, to answer, 524, 525.
prevents conclusion by facts of defense, 525.
effect of, to plea, 525.
when admits legal sufficiency of defense, 525.
rule in federal courts, 525.
form of general replication, 526.
general replication, as waiver of formal objections, 98.
waiver of filing, 98.

RESPONSIVENESS,
see "Discovery"; "Evidence."
in answer, defined, 519.
test of, 519.
nature of requirement, 519, 520.
determined by averments and charges of bill, 520.
rule dependent upon circumstances, 521.
fact determined by bill and answer, 522.

REVIVOR,
see "Bill of Revivor."
significance of the term, in equity, 297.
grounds upon which a suit may be revived, 298.

RULES OF PLEADING,
see "Answer"; "Bill in Equity"; "Certainty"; "Consistency and Directness"; "Demurrer"; "Disclaimer"; "Impertinence"; "Multifariousness"; "Plea"; "Scandal"; "Sufficiency."

S

SCANDAL,
see "Answer"; "Bill in Equity."
defined, 348.
in bill, 348.
in answer, 502, 503.
scope of rule forbidding, 348.

[The figures refer to pages.]

SCANDAL—Continued,
allegations contrary to decency, 348.
unnecessary imputation on defendant, 348.
nothing objectionable, if relevant, 348.
consequences of, 351.
not open to demurrer, 351.
exception the proper method, 351.
procedure in federal courts, 351.

SEQUESTRATION,
see "Writ of Sequestration."

SIGNATURE OF COUNSEL,
see "Answer"; "Bill in Equity"; "Demurrer"; "Plea."
for what purpose, 495.

SPEAKING DEMURRER,
see, also, "Demurrer."
what is, 373.
not allowed, why, 373.

SPECIAL DEMURRER,
defined, 363.
when used, 363, 369.
see, also, "Demurrer."

SPECIFIC PERFORMANCE,
when equity will compel, 260.
see "Bills for Specific Performance."

SPLITTING CAUSE OF ACTION,
see "Bill in Equity"; "Plea."
tends to multiplicity of suits, 464.
when cause for demurrer, 397.
when taken by plea, 464.

STATING PART, OR PREMISES,
see "Bill in Equity"; "Certainty"; "Consistency or Directness"; "Impertinence"; "Multifariousness"; "Scandal"; "Sufficiency."
important part of bill, 186.
nature and requisites of, 186, 187.
statement of cause of action, 187.
defective statement not aided by other parts of bill, 187.
must state case on which decree can properly be rendered, 187.
limits complainant's right of recovery, 189.
determines validity of plea, 190.
general statement often sufficient, 191.

[The figures refer to pages.]

STATING PART, OR PREMISES—Continued,
rules as to framing bill, 191.
must not state arguments, 192.
stating evidence, 192.
facts only required, in ordinary, 192.
but evidence may be stated to obtain discovery, 192.
should be limited to grounds for relief, 192.
what must be stated, 193.
complainant's title, or interest, 193.
an indispensable requisite, 193.
bill demurrable, if not shown, 194, 390.
foundation of right to sue, 194, 390.
bill to establish rights under will, 194.
bill for protection of easement, 195.
complainants suing jointly must all have interest, 195.
see, also, "Demurrer"; "Parties"
interest without right to sue, 195.
see, also, "Demurrer."
when it may occur, 195.
rule requires present right, 195.
noncompliance with formal requisites, 195.
want of privity, 196.
see, also, "Privity."
nonperformance of conditions precedent, 196.
nature of interest required, 196.
see, also, "Title or Interest."
must be present, existing, and vested, 196.
if vested, immaterial how small, 197.
if present, present possession unnecessary, 197.
not sufficient where defendant may defeat, 197.
relief dependent upon title or interest alleged, 197.
test as to necessary allegations, 197, 198.
manner of alleging title, 198.
see, also, "Title or Interest."
facts as to must be stated, 198.
title by descent, 198.
title by assignment, 199.
existence of title a legal conclusion, 199.
must be shown by facts, 199.
statement of injury, 199.
see "Injury or Grievance."
what it must show, 199.
must make case of equitable jurisdiction, 199.

[The figures refer to pages.]

STATING PART, OR PREMISES—Continued,
corresponds to breach at common law, 200.
relative importance in complainant's case, 200.
how made, in general, 200.
averment of want of remedy at law not alone sufficient, 201.
case for interference of equity must also appear, 201.
defendant's interest and liability, 201.
facts must appear, 201.
bill otherwise demurrable, 201.
see, also, "Demurrer."
interest of each of several parties must appear, 201.
exception, officers and agents of corporation joined for discovery, 201.
general statement sufficient, 202.
privity, when essential, 202.
see, also, "Privity."
when necessary to right, must be shown, 202.

STATUTE,
see, also, "Pleas in Bar"; "Statute of Frauds"; "Statute of Limitations."
how pleaded in bar, 468.
accompanying answer, 468.

STATUTE OF FRAUDS,
see "Demurrer"; "Plea."
when ground for demurrer, 379.
when ground for plea, 467.
distinction as to grounds of plea, 467.
when answer proper, 467.
negative plea, when good, 467.
extent of plea, 467.
when supported by answer, 468.

STATUTE OF LIMITATIONS,
see "Answer"; "Demurrer"; "Plea."
debt accrued more than six years, 465.
when sufficient defense, 465.
must be pleaded, in equity, if relied on, 465.
how pleaded, 465, 466.
if defense to part, only pleaded to part, 465.
when ground of demurrer, 398.
only when statutory period elapsed, 398.
answer also available, 465.

[The figures refer to pages.]

SUFFICIENCY,
in bill, 319.
rules as to, 319, 320.
facts to be stated, 320.
whatever essential to right to sue and relief sought, 320.
relief secundum allegata et probata, 320.
principle of the rule, 320.
interest of parties, how shown, 320.
rules as to statement of in bill, 319, 320.
must state facts, not inferences or conclusions, 321.
liability of obligor on bond, 321.
complainant suing as substituted trustee, 321.
suit in aid of action at law, 321.
must show due diligence in filing bill, 321.
delay in filing, how excused, 321.
discovery of immaterial matters, 321.
will not be required, 321.
if called for, ground for demurrer, 322.
bill to redeem, seeking discovery of trust, 322.
splitting cause of action, 322.
not allowed when, 322.
bill for part of entire account, 322.
suit must include all properly for determination, 322.
of answer, 504.
in general, 504, 505.
effect of general rule, 505.
discovery, how made, 506, 507.
not in general manner, 507.
specific answer, when required, 508.
what must be answered, 508.
rule not affected by want of special interrogatory, when, 508.
but subject to limitations, 508.
mere arithmetical proposition need not be answered, 508.
nor mere recital, unless direct interrogatory, 508.
nor questions upon mere hypothetical statements, 508.
nor beyond interrogatories founded upon bill, 508.
nor allegations upon information and belief, 509.
rule restated, 509.
when answer must be positive, 509.
when on information and belief, 509.
precise words unnecessary, 510.
allegation that defendant is entire stranger, 510.
other expressions sufficient, 510.

[The figures refer to pages.]

SUFFICIENCY—Continued,
knowledge or information derived from others, 510.
exceptions to general rule, 511.
what need not be answered, 511.
liability to penalty or forfeiture, 511.
see, also, "Penalty or Forfeiture."
general grounds of objection, 512.
defendant may decline answering if tending to establish, 512.
less degree of liability no excuse, 512.
objection set up by answer, 512.
when ground for declining answer, 513.
discovery of defendant's own title, 513.
when ground for not answering, 513, 514.
effect of equity rules, 514.
chancery rule, how modified by, 514.
when defendant excused from answering, 514.
how far defenses available in bar, 514, 515.
how far answer need extend, 515, 516.
general rule, how affected by, 517.
effect of insufficiency, 517.
see, also, "Admissions."
the rules not fully settled, 517.
the different rulings stated, 517, 518.
strictly, no constructive admission by, 517.
no implied admission without reasonable presumption, 518.
formal or evasive answer, not admission, 518.

SUPPLEMENTAL BILLS,
see "Bill in Equity."
defined, 290.
not generally allowed when amendment would be as effective, 291.
general objects of, 291.
rule limiting use of, 292.
cannot be sustained on facts known in time to amend, 292.
principal cases of use, 292.
necessary party added by, 292.
mistakes in material fact, 292.
new matter occurring since filing of original bill, 292.
to correct or support prayer, 292.
to add name of necessary party, 292.
when proper, in general, 293.
restrictions against, 293.
not allowed for matter wholly foreign to complainant's case, 293.
nor to set up new cause of action, 293.

[The figures refer to pages.]

SUPPLEMENTAL BILLS—Continued,
nor to supply missing cause of action, 293.
must be filed without unnecessary delay, 293.
new matter, corroborative only, not sufficient, 293.
with original bill, taken as one pleading, 293.
the statement of facts, 294.
requirements of former rule, 294.
modern rule requires, in general, statement of supplemental matter only, 294.
in case of new party brought in, 294.
equity against such party, how shown, 294.
rules as to certainty same as in bills for relief, 294.
facts stated must be material and consistent, 294.
to perpetuate testimony as to new facts, such facts must be alleged, 294.
prayer, 295.
general and special, 295.
in accordance with object of bill, 295.
relief sought must not be independent of or beyond original prayer, 295.
demurrers to, 405.
original bills in nature of supplemental bills, 295.
when proper, 295.
when new interest in pending suit arises in person not party to original bill, 295.
supplemental as to old parties, but original as to new, 295.
distinguished from supplemental bill, 295.
strictly original when entire interest of sole complainant or defendant has passed, 295.
demurrers to, 405.
pleas to, 483.
the equivalent code remedies, 296.
general principles of construction in equity, still applicable, 296.
more restricted than proceeding in equity, 296.

SUSTAINING DEMURRER,
see, also, "Demurrer."
effect of order, 376, 377.
interlocutory merely, 376.
former chancery practice, 377.
modern rule more liberal, 378.
leave to amend, when granted, 100, 101, 378.
not generally when demurrer sustained to whole equity of bill, 378.
the rule illustrated, 383.

[The figures refer to pages.]

SUSTAINING DEMURRER—Continued,
no bar when for formal or technical defects merely, 381.
doctrine in the federal courts, 382, 383.

T

TAKING BILL PRO CONFESSO,
see "Default."
when decree entered, in general, 78.
failure of defendant to appear, after service, 79.
effect, as an admission, 79–83.
no admission by infant defendant, 83.
none by refusing to plead, 83.
irregular or frivolous answer, 83.
default by one of several joint defendants, 83.
decree upon amended bill, 84.
none without service of new subpœna, 84.
decree in federal practice, 84.
effect of decree, 84.
concludes defendant, how far, 84.
as to material facts well pleaded, 84.
decree final, when, 84.
final decree must follow order, 84.
discretionary with court, 85.
practice on, 85.
not where unreasonable delay, 85.
mistake or surprise, 85.
where defendant has meritorious defense, 85.
opening decrees pro confesso, 85.

TENANTS IN COMMON,
see "Bills for Partition"; "Parties."
joinder in pleading, rule as to, 57.
entitled to partition as matter of right, 248.

TESTIMONY,
see "Evidence."

TITLE OR INTEREST,
see, also, "Bill in Equity"; "Certainty"; "Sufficiency."
of parties in subject-matter, 193.
of complainant, 193.
must be in subject-matter of suit, 193.
method of stating, in general, 325.
substantially same as at common law, 325.
facts as to, must generally be stated, 325.

[The figures refer to pages.]

TITLE OR INTEREST—Continued,
derivation of title derived from others to be shown, 325.
ownership of real property, 325.
established forms to be adopted, 326.
heirship, how shown, 326.
title by mediate descent, 326.
not always necessary to show every link in pedigree, 326.
application of rules according to circumstances of each case, 326.
test generally adopted, 326.
want of, ground for demurrer, 395.
of defendant, 326.
may be stated in general terms, 327, 328.
when a defense, 476, 477.
want of liability in, when ground for demurrer, 395.
defendant's title mostly concerned, demurrer to discovery, 403.
when presented by plea, 476, 477.
by devisee against heir, 477.
by grantee of ancestor against heir, 477.
unreasonable lapse of time, long-continued possession, 477.
TRUSTEES,
decree against, when impeached for fraud, 317.

V

VALUE OF SUBJECT-MATTER,
see, also, "Demurrer."
insufficient, when ground for demurrer, 396.

W

WRIT OF ASSISTANCE,
see "Decrees"; "Enforcement of Decrees."
defined, 161.
nature and object of, 162.
to compel delivery of possession after decree, 162.
to aid purchaser at judicial sale, 162.
issuance discretionary with court, 162.
must regularly be applied for by party to suit, 162.
may be by grantee or assignee of purchaser, 162.
instances of methods of application for writ, 162.
issues only against parties to the record or those coming into possession pending the suit, 163.
WRIT OF ATTACHMENT,
see "Contempts"; "Enforcement of Decrees"; "Process for Appearance."

[The figures refer to pages.]

WRIT OF ATTACHMENT—Continued,
mesne process, for what objects, 73, 159.
when an available remedy, 73, 159.
allowance discretionary, 74.
different from common-law remedies, 160.
service and return, 160.
return of "non est inventus," when made, 160.

WRIT OF EXECUTION,
see "Enforcement of Decrees"; "Execution."
defined, 163.
when issued, 163.
generally to enforce decrees for payment of money, 163.
issued by court rendering decree, 163.
complainant entitled, as matter of right, unless forbidden by decree, 163.
how executed, 163.

WRIT OF SEQUESTRATION,
see "Enforcement of Decrees."
nature and object of the writ, 160.
for what purposes available, 160.
to compel appearance and answer, 74.
see, also, "Process for Appearance."
to compel obedience to decrees, 161.
use more extensive in some states, 161.
follows "non est inventus" on writ of attachment, 161.
method of procedure under, 161.
property held under, 161.
authority and duties of sequestrators, 161.
still a chancery remedy, unless superseded by different method, 161.

WRITTEN INSTRUMENTS,
see, also, "Certainty."
how pleaded, 337.
in suit for reformation, 258.
see "Bills to Reform Instruments."

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13. Construction of Wills—Controlling Principles.
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